Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED ON PETITION FOR WRIT OF CERTIORARI UNDER RULES 10 AND 13 OF THE U.S. SUPREME COURT

I

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and the Eleventh Amendment, must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which order was pending in the state system and

had been issued and served, but enforcement of which had been stayed for 10 days to permit an appeal to the Nevada State Court Judicial System; during which stay period the Nevada citizen filed a federal civil rights lawsuit for, and obtained, an injunction under 42 U.S.C. Section 1983, in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the United States District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment and this Court's abstention ruling in Huffman, supra?

II

Whether under the law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) as explicated in University of Tennessee v. Elliott, 478 U.S. 788 (1986),

the United States District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system?

III

Whether the Opinion published by the United States Court of Appeals for the Ninth Circuit as 8 F.3d 1348 (CA9, 1993), which expressed the unanimous decision of that Court and contained findings of fact and conclusions of law holding:

(1) that the principles of law

expressed by Chief Justice Rhenquist in Huffman v. Pursue, Ltd. control; and

(2) that the Huffman abstention doctrine applies to the trial facts below, which the Court of Appeals characterized (see Appendix 3-6 through 3-10) as being analagous to the facts and controlled by the law expressed by the United States Supreme Court in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and in New Orleans Public Serv., Inc. ("N.O.P.S.I.") v. City Council of New Orleans, 491 U.S. 350 (1989); and

(3) which the Court certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure;

was binding upon the Court itself and acted as a limitation on its future actions, so that such opinion could not thereafter be withdrawn by the Court

without providing a good and lawful reason as to why such undisturbed findings of fact and conclusions of law should not be applied as the law of the case?

IV

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires an application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical

Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2?

V

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger Younger-Huffman abstention defenses and result in the invocation of the abstention doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941)?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ON PETITION FOR WRIT OF CERTIORARI UNDER RULES 10 AND 13 OF THE U.S. SUPREME COURT..... i

TABLE OF AUTHORITIES..... ix

INDEX OF APPENDICES..... xiv

CONSTITUTIONAL CLAIMS RAISED BY THE CITY OF HENDERSON..... xxi

INTRODUCTION..... 1

OPINIONS BELOW..... 2

JURISDICTION..... 2

CITY ORDINANCES INVOLVED..... 2

STATEMENT OF FACTS..... 3

STATEMENT OF THE CASE..... 36

(A) THIS COURT'S DECISIONS IN WATSON v. BUCK, HUFFMAN v. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE v. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION..... 40

REASONS FOR GRANTING THE WRIT OF CERTIORARI UNDER RULE 10..... 45

INTRODUCTION..... 45

I. WHERE THE ABSTENTION DOCTRINE EXPRESSED IN HUFFMAN V. PURSUE, LTD., 420 U.S. 592 IS APPLICABLE, AS HERE, THE FEDERAL COURT MUST DEFER TO THE STATE JUDICIAL SYSTEM AND DISMISS THE FEDERAL CIVIL RIGHTS COMPLAINT ON THE

TABLE OF CONTENTS

PAGE

GROUNDS OF LACK OF SUBJECT MATTER JURISDICTION..... 47

I(A) THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THE VALIDITY OF THE CITY OF HENDERSON'S CLAIM THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION AND THAT THE COURT OF APPEALS BELOW ERRED IN REFUSING TO DISMISS THE CIVIL RIGHTS LAWSUIT UPON THE "LACK OF SUBJECT MATTER JURISDICTION ISSUE"..... 51

I(B) WIENER v. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED..... 55

I(C) IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY..... 61

CONCLUSION..... 63

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

D.C. Court of Appeals v. Feldman,
460 U.S. 462 (1983).....24, 51, 52, 61

Dubinka v. Judges of the Supreme Court,
23 F.3d 218 (CA 9,
April 8, 1994).....32, 50, 51, 52,
54, 58, 61, 62, 63

England v. Louisiana State Board
of Medical Examiners,
375 U.S. 411 (1964).....14

Hicks v. Miranda,
422 U.S. 332 (1973).....13, 22

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975).....11, 13, 17, 24,
26, 28, 30, 31, 34, 38, 40,
41, 42, 43, 44, 45, 46, 47,
49, 50, 51, 53, 55, 56, 57,
58, 59, 61, 62, 63, 64

Kokkonnen v. Guardian Life Ins. Co.
of America,
54 CCH S.Ct. Bull. B1724
(CA 9, May 16, 1994).....35

New Orleans Public Serv., Inc. v.
City Council of New Orleans,
491 U.S. 350 (1989).....45, 49

New York Football Giants, Inc. v.
L.A. Chargers Football Club, Inc.,
291 F.2d 471 (1961)..... 12

Ohio Bureau of Employment Services
v. Hodory,
431 U.S. 471 (1977).....14

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.
477 U.S. 619 (1986).....38, 45, 47, 49

U.S. v. Thirty-Seven Photographs,
402 U.S. 363 (1971).....57

University of Tennessee v. Elliott,
478 u.s. 788 (1986).....44

Watson v. Buck,
313 U.S. 367 (1941).....26, 44, 54, 55, 56, 57, 58

Wiener v. County of San Diego,
23 F.3d 263 (CA 9, April 5, 1994).....32, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 62

World Famous Drinking Emporium, Inc. v. City of Tempe,
820 F.2d 1079 (CA 9, 1987).....19

Younger v. Harris
401 U.S. 37 (1971).....11, 33, 38, 40, 41, 42, 50, 51, 52, 53, 54, 61, 62

STATE CASES

City of Las Vegas v. Nevada Industries,
772 P.2d 1275..... 16, 37

People ex rel. Busch v. Projection Room Theater,
17 Cal.3d 61 (1976).....57

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
Eleventh...11, 22, 26, 29, 30, 31, 39, 53, 54, 55, 59, 62

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

28 U.S.C.
Section 1254(1).....2
Section 1292(b).....23
Section 1651(a).....19, 21, 22, 26
Section 2101(e).....18
Section 2101(f).....18

42 U.S.C.
Section 1983.....9, 11, 37, 40, 43, 60, 61
Section 1988.....63, 64

FEDERAL RULES

U.S. Supreme Court Rules
Rule 10.1(a).....2, 45, 63
Rule 10.1(c).....2, 45, 63
Rule 13.....18
Rule 13.1.....2
Rule 13.4.....2
Rule 22.5.....18
Rule 23.....18
Rule 23.1.....19
Rule 41(b).....36

Federal Rules of Civil Procedure
Rule 62(c).....26
Rule 65.....12

Federal Rules of Appellate Procedure
Rule 5.....23

Rules of the Ninth Circuit
Rule 27-3.....28

TABLE OF AUTHORITIES

PAGE

STATE LAW

Henderson Municipal Code
Section 4.06.160.....3, 37
Section 4.04.150(a)(1).....3
Section 4.04.150(a)(3).....3
Section 4.04.150(a)(4).....3
Section 4.04.150(b)(2).....3
Section 4.04.150(b)(3).....3
Section 4.04.150(b)(5).....3
Section 4.06.....3, 10

TEXTS

Sutherland, Stat. Const. (4th Ed.).....60

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
1	Decision and Final Judgment of the United States District Court, District of Nevada, by the Honorable Lloyd D. George, in the Civil Rights Action (42 U.S.C. Section 1983) Nevada Entertainment Industries, Inc. et al., Plaintiffs, v. City of Henderson, et al., Defendants, CV-S-90-264-LDG(LRL), filed on November 27, 1992. (Vacating the preliminary injunction entered by the Court on June 5, 1990 and entering Judgment in favor of the City after reexamining the Quasi Judicial finding of fraud made by the City Council and finding that it had acted properly. Reference: Was this a violation of the Eleventh Amendment and Huffman abstention by the U.S. District Court.
2	Order of the United States Court of Appeals for the Ninth Circuit (Noonan and T.G. Nelson, Circuit Judges), continuing Preliminary Injunction pending disposition of Appeal, filed December 22, 1992. Reference: When examined in the light of the Ninth Circuit Opinion on November 2, 1993 (Appendix 3), was this a violation of the Eleventh Amendment and Huffman Abstention by the U.S. Court of Appeals.

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
3	Ninth Circuit Opinion filed November 2, 1993 and reported at 8 F.3d 1348 (CA 9, 1993) but withdrawn on April 7, 1994 which adhered to the U.S. Supreme Court Decisions in New Orleans Pub., Serv., Inc. (NOPSI) v. City Counsel of New Orleans 420 U.S. 592, 608 (1975) and Ohio Civil Rights Commission v. Dayton Christian School, Inc., 477 U.S. 619 (1986) and upheld the City's contention on cross-appeal of the Decision and Final Judgment of the District Court in Nevada Entertainment Industries, Inc. v. City of Henderson et al., that the Huffman abstention doctrine applied. Reference: First Opinion of the United States Court of Appeals upholding the City's contention that the Huffman abstention doctrine applied in the City's Cross-Appeal.
4	Response of City of Henderson to Petition for Rehearing and Suggestion for Rehearing En Banc of Nevada Entertainment Industries, Inc. Reference: In its reponse at Appendix pages 4-16 and 4-17 the City of Henderson reminded the Court of Appeal of the 'bottom line" record "fact" that Assistant City Attorney Liza Conroy had unsuccessfully cited the Equity "Clean Hands" doctrine and the City Council's "Fraud" findings at the initial hearing on the TRO, as a basis for one of the City's claims the federal court

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
4(cont.)	lacked subject matter jurisdiction. Shortly thereafter, the Court of Appeals utilized that "lack of subject matter jurisdiction" ground in its memorandum decision of May 4, 1994 to deny the City's its right to an award as the prevailing defendant on its cross-appeal, under existing U.S. Supreme Court precedent, to a final judgment on the Huffman Abstention!
5	Order of the Court of Appeals for the Ninth Circuit, dated April 7, 1994, withdrawing its Opinion dated November 2, 1993. Reference: The City of Henderson contends this Order is an act in excess of the Court's subject matter jurisdiction under Huffman principles and Kokkonen (supra) see Appendix 9B).
6	Memorandum Decision of the Court of Appeals for the Ninth Circuit filed on May 4, 1994. holding the City's right to a Judgment on its cross-appeal based upon Huffman abstention was moot. Reference: The City of Henderson contends this decision is an act in excess of the Court's subject matter jurisdiction under Huffman principle and Kokkonen, supra, see Appendix 9B).
7	City of Henderson's Petition for Rehearing, filed May 18, 1994.

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
8	Order of the United States Court of Appeals for the Ninth Circuit denying the City of Henderson's Petition for Rehearing, filed June 14, 1994.
9A	City of Henderson's Motion For Leave to File Second Petition for Rehearing filed June 17, 1994 based upon Kokkonen v. Guardian Life Ins., Co. of America decided May 16, 1994.
9B	Second Petition for Rehearing of City of Henderson lodged June 17, 1994, claiming a lack of subject matter jurisdiction in the Ninth Circuit to withdraw the Ninth Circuit November 2, 1993 Opinion after it was published, because of the November 2nd undisturbed Finding of Fact and Conclusion of Law that Huffman Abstention applied, drawing an analogy to the U.S. Supreme Court decision in Kokkonen on May 16, 1994.
10	Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing of Nevada Entertainment, Inc. and both the City of Henderson's Motion for Leave to file a second Petition for Rehearing and its Motion for Order Staying the Mandate, filed July 11, 1994.
11	Order of the United States Court of Appeals for the Ninth Circuit granting Nevada Entertainment's Motion to Stay the Mandate, filed July 25, 1994.

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
12	Order of the United States Court of Appeals for the Ninth Circuit filed August 24, 1994 granting the Parties Joint Motion for Order Extending the Stay of the Mandate until the final disposition of the Parties' Petitions for Writs of Certiorari, which are to be filed on or before, Tuesday, October 11, 1994.
13	Order of the United States Court of Appeals for the Ninth Circuit informing the Parties that the Panel has voted to reject the Suggestion for Rehearing En Banc and that no Judge of the En Banc Court has requested a vote on the Suggestion for Rehearing En Banc, filed on May 11, 1994.
14	Supplemental Brief to Petition for a Writ of Mandamus (or Certiorari Under Rule 11) in Case No. 93-1969. Reference: Explains the relevance and great importance of the recent Ninth Circuit's Opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (April 8, 1994) (CA 9) which contained a proper analysis of the "lack of subject matter jurisdiction" issue in relation to the Younger-Huffman Abstention Doctrine.
15	Henderson Municipal Code, Sections 4.04.150(a), (3), and (4); Sections 4.04.150 (b) (2), (3), and (5); and Section 4.06 (entire Section).

INDEX OF APPENDICES

APPENDIX	DESCRIPTION
16	United States District court's Order, filed March 22, 1991 wherein the trial court held that Huffman Abstention was not applicable and denying the City of Henderson's first Motion to Dismiss upon Huffman abstention grounds.
17	Petition for Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 Statement of the Case at pages 21-65.

CONSTITUTIONAL CLAIMS RAISED BY THE CITY OF HENDERSON

The City of Henderson's claims that the federal courts lack "subject matter jurisdiction" of the Civil Rights Complaint (42 U.S.C. Section 1983) were asserted as follows:

(1) pursuant to the "clean hands" doctrine, citing New York Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, at 474 (1961): at the hearing on the temporary restraining order on April 27, 1990 [see R.T. for April 27, 1990, at p. 15, lines 2-11].

(2) pursuant to the Eleventh Amendment and the abstention doctrine established in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); and Hicks v. Miranda, 422 U.S. 332 (1975): at the City of Henderson's First Motion to Dismiss which followed the City's filing of a declaratory judgment lawsuit in the Nevada District Court.

(3) pursuant to the Eleventh

Amendment, Huffman doctrine, and res judicata and collateral estoppel doctrines, as explicated in University of Tennessee v. Elliott, 478 U.S. 788 (1986): Second Motion in the United States District Court to Dismiss made before the trial of the Federal Civil Rights complaint in the United States District Court.

(4) pursuant to the Eleventh Amendment and Huffman abstention doctrine: City of Henderson's Cross-Appeal to the United States Court of Appeals for the Ninth Circuit.

(5) pursuant to the Eleventh Amendment, Huffman abstention doctrine, and Kokkonnen v. Guardian Life Ins. Co. of America, CCH S.Ct. Bulletin, p. B1724-1732: Second Petition for Rehearing in the United States Court of Appeals following the withdrawal of the November 2, 1993 Opinion and Judgment (Appendix 9, infra, at pages 9-15, through 9-17).

(6) pursuant to the Eleventh

Amendment and Huffman abstention doctrine: two pre-trial Petitions for a Writ of Certiorari, etc., being: City of Henderson, a Nevada Municipal Corp. et al. v. United States District Court, District of Nevada, Nevada Entertainment Industries, Inc., a Nevada corporation and Daniel Bishop, Real Parties in Interest:

(a) in the Supreme Court of the United States, October Term 1990, Case No. 90-1771, filed on May 16, 1991, and denied on October 7, 1991; and

(b) in the Supreme Court of the United States, October Term 1992, Case No. 92-643, filed on October 13, 1992, and denied on December 7, 1992.

(7) pursuant to the Eleventh Amendment and Huffman abstention doctrine in Petition for a writ of Mandamus in In Re City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., in the Supreme Court of the United States, October Term 1993, Case No. 93-1969, filed

on June 6, 1994, and denied on October 3, 1994.

CLAIMS UNDER RULES 10.1(a) AND 10.1(c) OF THE U.S. SUPREME COURT RULES

The City of Henderson's claim of jurisdiction as to the Petition for Writ of Certiorari herein under Rule 10.1(a) relates to the conflict between the Court of Appeals' November 2, 1993 Opinion [which applied Huffman v. Pursue Ltd but erroneously refused to rule upon the "lack of subject matter jurisdiction" issue (Appendix 3-1, et seq., infra)], and the concurring opinion of Associate Justice Kennedy in the World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (CA 9, 1987) [which holds that Huffman Abstention is based upon "lack of subject matter jurisdiction" and is correctly decided]; and the conflict between said Court of Appeals for the Ninth Circuit's November 2, 1993 Opinion (Appendix 3-1 et seq.) and the recent Court of Appeals' opinion in Wiener v.

County of San Diego, 23 F.3d 263 (CA 9, April 5, 1994) with the recent Court of Appeals opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 215 (CA 9, December 8, 1993) [which analyzed the "lack of subject matter jurisdiction" issue, and is correctly decided]. See, in this regard, the Petitioners' Supplementary Brief to Petition for a Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 (Appendix 14 to the Petition for Writ of Certiorari herein at page 14-20).

The City of Henderson's claim of jurisdiction as to the Petition for Writ of Certiorari herein under Rule 10.1(c) relates to the arbitrary refusal of the Court of Appeals to apply, as the law of this case in its Memorandum decision on May 4, 1994 (Appendix 6), the law laid down by the United States Supreme Court in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and New Orleans Public Serv., Inc.

v. City Council of New Orleans, 491 U.S. 390 (19__) which its November 2, 1993 Opinion (Appendix 3) held was controlling precedent on the City's Cross-Appeal. See Petition for Writ of Mandamus in Case No. 93-1969, at Supplementary Brief (Appendix 14).]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Petitioners

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
Respondents

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTRODUCTION

The City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

A copy of the opinions and orders of the United States District Court, District of Nevada, and the United States Court of Appeals for the Ninth Circuit, as to which the City of Henderson seeks relief, appear at Appendices 1, 2, 3, 5, 6, 8, 10, and 16, and are described by title at "Index of Appendices" at page ___, supra.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rules 10.1(a), 10.1(c), 13.1 and 13.4 of the United States Supreme Court.

The Court of Appeals entered its judgment on May 4, 1994 (App. 6 infra.).

The Order denying the Petition for Rehearing of Nevada Enterprise, Inc. was filed on July 11, 1994. The filing of this petition is within the 90 day period set by Rule 13.4.

CITY ORDINANCES INVOLVED

The text of Henderson Municipal Code

sections 4.06.160; 4.04.150(a)(1), (3), and (4); 4.04.150(b)(2), (3), and (5); and 4.06 (entire section) is set forth at Appendix 15 herein.

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under State law and the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses

which required application for a conditional use permit (as to which Nevada Entertainment, Inc. has never filed an application).

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a revenue based business license, indicating that their intended use of the property would be that of an "adult business." In applying for the business license, Federal Plaintiffs learned of the new provisions for sexually oriented adult businesses, including the need to apply for a zone change or variance, and a request for a conditional use permit, to permit them to operate such a business at their specific location.

Federal plaintiffs were informed by

the City that, under the applicable zoning provisions, the site they had rented was not then zoned for "adult use," and that if they wanted to operate an "adult use," they would have to request a variance or change in zoning.

Federal plaintiffs asked City officials if they could immediately open for business if they decided to operate a different use, such as a general video store (which was a separate and distinct use from an adult business under the new zoning code). They were told that their rented site was zoned for use as a general video store, but since this was a change in the described use in their business application form, they could qualify for issuance of a business under that use only if they resubmitted their business license application and indicated their intention to open a general video store.

Federal plaintiffs did not apply for a zone change or variance or conditional use permit. Instead, they submitted an

amended application for a business license, in which they intentionally and with knowledge of the substantive difference between the two categories, applied for permission to operate a business fraudulently described as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business."

In September of 1989, federal plaintiffs, on the basis of this intentional misrepresentation, were issued a revenue-based business license to operate a general video store on the Premises located at 1100 Boulder Highway, Henderson, Nevada, under the name "Fantasy Video Plus."

The operation opened for business in or about February 1990. Although Federal Plaintiffs had represented to the City during the business license application process that the business use for "Fantasy Video Plus" would be that of a general video store, they immediately operated the

same as an "Adult Business." Federal plaintiffs admit in this action and have stipulated that since opening for business they have used the Premises for the continuous operation of a different business use, i.e. that of an Adult Business.

An Adult Business is a business use separate and distinct from a general video store. In the course of making application for their business license, federal plaintiffs had been made aware that there was a substantive difference between the two uses (general video vs. Adult Business), and had affirmatively assured the Community and Planning Departments' inspecting official that the business was not an "Adult Business" but was rather a general video business. See paragraph 6 of Licensees' Answer to Complaint, filed before the Henderson City Council in In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

When the licensees' deception came to the attention of the City inspectors, state law enforcement action was commenced through the filing of a complaint and the initiation of administrative license revocation proceedings against Federal Plaintiffs, which sought the revocation of the business license issued to the operation "Fantasy Video Plus," on the grounds that licensees had deliberately made fraudulent and material misrepresentations in their business license application in order to secure immediate issuance of the license. This state administrative enforcement action came before the City Council for hearing on April 10, 1990.

At the state license revocation proceedings, it was determined that

federal plaintiffs' misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues they sought to relitigate in their federal civil rights complaint under 42 U.S.C. Section 1983. (See Federal Plaintiffs' Answer to the City of Henderson Summons and Complaint before the City Council in license revocation proceedings, appearing as Appendix 1 in the Petition for Writ of Certiorari in Case No. 92-643.

The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by the municipal licensing ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") 4.06.160]. See copy of the City Council's findings of fact, conclusions of law, and order attached at Appendix 2 to the Petition for Writ of Certiorari in Case No. 92-643. Federal Plaintiffs incorrectly asserted at page 14 of their brief on appeal that the City "stayed its decision" for ten days. The correct statement is that the City, by its order dated April 16, 1989, revoked licensees' business license, but stayed enforcement action on the revocation, for a period of ten days, in order to allow the licensees an immediate and unfettered opportunity to have this revocation action reviewed by the state court, as provided by state law and municipal ordinance.

Instead of appealing the City

Council's (quasi-judicial) administrative factfinding and license revocation in state court, licensees filed this action in federal court as a defense to the City's enforcement action (which was pending because of the stay issued and the existence of a statutory right to appeal the City's action within the state judicial system), thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

It is important to note at the outset of these Statement of Facts that the gravamen of the 42 U.S.C. Section 1983 complaint is its federal interference with state judicial procedures, (not with mere City functions). The City, in defending against the civil rights complaint, is acting as an agent of the State and is relying upon the Eleventh Amendment, because it is claiming interference with the State's judicial procedures for review

of quasi-judicial findings-of-fact by municipal agencies.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. At the hearing on the TRO, Assistant City Attorney Liza Conroy cited New York Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, at 474 (1961), and unsuccessfully involked the "clean hands" equity doctrine, and the City Council's quasi-judicial finding of "fraud" as ground for requiring the United States District Court to rule that it lacked subject matter jurisdiction and to deny the equitable relief sought (injunction) and to dismiss the civil rights complaint for "lack of subject matter jurisdiction." (Note, in this regard, the City of Henderson's response dated January 16, 1994, to Attorney Diamonds Petition for Rehearing at Appendix Page 4-16 and 4-17 and the fact

that shortly thereafter (3 months later) the Ninth Circuit withdrew its November 2, 1993 Opinion and substituted its May 4, 1994 Memorandum.

On June 4, 1990, following oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed. A copy of the Temporary Restraining Order and Preliminary Injunction is attached at Appendix 3 and 4 to the Petition for Writ of Certiorari in Case No. 92-643.

After further study of the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., supra, as impacted by the United States Supreme Court's ruling in Hicks v. Miranda, 422 U.S. 332 (1973), the City of Henderson declared their refusal to consent to federal jurisdiction [see

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990 (setting forth the same issues which were present in the federal civil rights complaint); and (2) a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present all of their federal constitutional claims in the Nevada law enforcement lawsuit. (See, in this regard, Question 4 on page ___ and the clash, in such cases, with respect to the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411

(1964).

The City of Henderson further requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

On March 22, 1991 (almost six months after Defendants herein had filed their motion to dismiss and request for an immediate hearing), the United States District Court herein filed its opinion and order which denied the Defendants' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. A copy of the March 22, 1991 Opinion and Order is attached at Appendix 16 to the Petition for Writ of Certiorari herein.

On March 29, 1991, Defendants indicated to the United States District Court at a pre-trial conference that they

intended to file a Motion in which they would request the Court to amend its order of March 22, 1991, so as to authorize an immediate appeal to the Ninth Circuit Court of Appeals and, if necessary, to the United States Supreme Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's state right to adjudicate important State issues such as licensing (revocation) procedures and judicial review by the State of Nevada of the quasi-judicial fact finding of the City Council in which it revoked the license of Fantasy Video Plus because of the use of fraud in obtaining the business license. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. United States District Court Judge Lloyd George, without ruling on Defendants' motion on the abstention doctrine, indicated at said pre-trial conference that he wished to proceed quickly and hold

the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal.

On April 1, 1991, Defendants filed their Motion to Amend re Interlocutory Order and Stay Proceedings. On April 9, 1991, Judge George entered an Order denying the Defendants' Motion to Amend his March 22 Order (to permit an interlocutory appeal). A copy of the April 9, 1991 Order is attached at Appendix 6 to the Petition for Writ of Certiorari in Case No. 92-643.

On April 15, 1991, Defendants filed a Petition for writ of mandamus and request for a stay with the Ninth Circuit Court of Appeals. In its pre-trial Petition for Mandamus, the City relied upon the jurisdictional issue which Huffman triggered, but did not argue the res judicata/collateral estoppel jurisdictional issue. On May 2, 1991, the Ninth Circuit issued an Order denying the

petition and request for a stay. A copy of the May 2, 1991 Order is attached at Appendix 7 to the Petition for Writ of Certiorari in Case No. 92-643.

On May 9, 1991, Defendants filed a petition for writ of certiorari with the United States Supreme Court, pursuant to Rule 13 of the Rules of the Supreme Court of the United States City of Henderson et al. v. U.S. District Court, Oct. Term 1990, No. 90-1771, together with an Application for Stay, addressed to the Honorable Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, pursuant to 28 U.S.C. 2101(e) and Rule 23 of the United States Supreme Court Rules, requesting a stay pending final action on the Petition for Writ of Certiorari. On May 20, 1991, Associate Justice O'Connor denied this Application.

Pursuant to 28 U.S.C. section 2101(f) and Rules 22.5 and 23 of the Supreme Court Rules, Defendants then resubmitted their Application for Stay, addressed to

Associate Justice Anthony M. Kennedy, together with a motion for an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. section 1651(a) and United States Supreme Court Rule 23.1. This reapplication relied on Associate Justice Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (9th Cir. 1987), which seemed to infer agreement with the Petitioner's contention that the United States Supreme Court had clarified Huffman, so as to require in a federal case such as this, a dismissal based upon lack of "subject matter jurisdiction." Justice Kennedy referred said Application to the entire Court for action, which denied the application on June 10, 1991.

Ultimately, the federal trial herein was continued to September 9, 1991.

On July 17, 1991, attorney Roger Jon Diamond, counsel for the federal Plaintiffs herein, sent a letter to Liza

Conroy, Assistant City Attorney for the City of Henderson, which referred to the joint case conference report due in the related state declaratory judgment action (City of Henderson v. Nevada Entertainment Industries, Clark County District Court No. A288647) (hereinafter "related state case"), and stated that state defendants would sign the report, but with the understanding that the Clark County District court case would not go to trial unless the City was successful in obtaining a dismissal of the pending federal case.

On August 9, 1991, the Scheduling Order in the related state case was filed, which set the matter for trial on the court's earliest available date beginning March 9, 1992.

On August 12, 1991, a Stipulation for Order continuing the federal trial herein and Order thereon was filed, which continued the federal trial date herein from September 9, 1991, to January 6,

1992, with calendar call on January 2, 1992.

On October 7, 1991, the United States Supreme Court issued an Order denying the petition for writ of certiorari in Case No. 90-1771. On December 2, 1991, the United States Supreme Court denied a petition for rehearing.

Both Plaintiffs and Defendants filed trial briefs, and submitted the case for trial on the briefs. By stipulation, the evidentiary record from the state quasi-judicial proceeding was filed with the U.S. District Court and designated to be used as the evidentiary record before the United States District Court on trial of the final injunction. It should be noted that the stipulation of the record of the State quasi-judicial proceeding into evidence clearly established the City of Henderson's claims that the federal court's exercise of jurisdiction presented a "collateral" attack on the City Council's order, warranting use of the All

Writs Act.

The City then renewed its motion to dismiss for lack of subject matter jurisdiction, and also moved to dismiss on the grounds of res judicata and collateral estoppel. At this point, the trial judge apparently became aware of the implications of the City of Henderson's refusal to waive its Eleventh Amendment privilege (and its claim of lack of "subject matter jurisdiction") and his refusal to apply the rule of law expressed in Miranda v. Hicks on the City's first Motion to Dismiss which was denied on March 22, 1991. See Appendix 16 to the Petition for Writ of Certiorari herein. On June 17, 1992, the Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, on his own motion, signed an Order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would amend his prior order denying that request. The

June 17th Order is attached at Appendix 8 to the Petition for Writ of Certiorari in Case No. 92-643. On July 2, 1992, the Court signed an order amending its prior Order of March 22, 1992 so as to certify the same for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). A copy of said Order is annexed to the Petition for Writ of Certiorari in Case No. 92-643 at Appendix 9.

On August 3, 1992, the U.S. Court of Appeals for the Ninth Circuit denied the City's Petition for Permission to Appeal Pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. Rule 5. See Appendix 10 to the Petition for Writ of Certiorari in case No. 92-643.

On October 13, 1992, the City of Henderson filed a Petition for Writ of Certiorari to the United States Court of Appeals in City of Henderson, a Nevada Municipal Corp. et al. v. U.S. Dist. Court, Dist. of Nev. [Nevada Entertainment Industries, Inc., a Nevada Corp. and

Daniel Bishop, Real Parties in Interest], Oct. Term 1992, No. 92-643.

On November 27, 1992, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL), see Appendix 1 to the Petition for Writ of Certiorari herein, in which the Federal Court, in the face of the Huffman abstention doctrine and the Feldman doctrine, relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be

authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal

pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. See Supplemental Brief in Case No. 92-643, at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in Case No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion in which it

denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a Motion for Judgment of Dismissal on Grounds of Comity and Lack of Subject Matter Jurisdiction, pursuant to Huffman v. Pursue, Ltd..

On December 22, 1992 the Court of Appeals (Noonan and T.J. Nelson) filed an order: (1) denying the Motion to Dismiss; (2) granting Licensees' Emergency Motion for Injunction Pending Appeal; (3) staying the

U.S. District Court November 25, 1992 Order; and (4) expediting the appeal, ordered a detailed brief schedule, and set the matter for argument in San Francisco during the week of April 12 (see Appendix 2 to the Petition for Writ of Certiorari herein).

On December 22, 1992, the City filed its Notice of Cross-Appeal to the U.S. Court of Appeals for the Ninth Circuit from the Trial Judgment entered on November 27, 1992.

On May 10, 1993, the Court of Appeals for the Ninth Circuit heard oral argument during which the Court stated to the City's counsel of record that it was not interested in hearing argument of the Eleventh Amendment jurisdictional issue, which was framed by Justice Kennedy's separate opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, supra.

On November 2, 1993, the Court of Appeals filed an Opinion and certified the same for Publication under Circuit Rule 36-2, in which it reversed the Judge of the

United States District Court and held that the Court should have abstained under Huffman v. Pursue, Ltd., as contended by the City in its cross-appeal, but omitted any reference to the Eleventh Amendment "subject matter jurisdiction" issue. (See copy at Appendix 3 to the Petition for Writ of Certiorari herein.)

The Court of Appeals further held in relation to attorney's fees that "The District Court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal." The Opinion contained the following conclusion:

> "Conclusion"
>
> "The decision of the district court refusing to abstain from exercising jurisdiction is reversed and the case is remanded to the district court with instructions to vacate its judgment and dismiss the complaint." (Our Emphasis.)

On November 30, 1993, Nevada Entertainment Industries, Inc. et al filed a petition for rehearing and suggestion that the Court rehear the matter en banc which

emphasized the fact that the Court's opinion did not hold that the federal court lacked subject matter jurisdiction. [The Petition for Rehearing introduced new contentions such as "consent" to federal jurisdiction. (See Appendix 4-10 through 4-17 to this Petition) and other contentions which are regularly advanced and considered in connection with the Wiener, infra, interpretation of Huffman abstention but totally inconsistent with the Dubinka, infra, interpretation of Huffman abstention].

On January 18, 1994, the City of Henderson et al. filed their "Response to the Petition for Rehearing and Suggestion for Hearing en Banc." See copy at Appendix 4 to this Petition, at Appendix pages 4-10 through 4-17, where the City claimed that the Court of Appeals' failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issue was responsible for the confusion which regularly appears in Huffman abstention decisions. Compare

Dubinka, infra, with Wiener, infra. The City's Response (see Appendix pages 4-17) ended with the caveat that, notwithstanding these many new claims of Nevada Entertainment Inc., the Ninth Circuit was faced with a "bottom line" record fact on appeal; that is, that Assistant City Attorney Liza Conroy at the outset had objected to the Court's jurisdiciton under the Equity maxim of "clean hands." (See Appendix at page 4-17.)

On April 7, 1994, the Court of Appeals filed an order reading:

> "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9, 1993) is withdrawn."

See copy at Appendix 5 to the Petition for Writ of Certiorari herein.

On May 4, 1994, the Court of Appeals filed a Memorandum Opinion in which it noted in a footnote on page 1, that the Memorandum was not appropriate for publication and may not be cited to or by the court of the

circuit. Thereafter, the court reexamined the City's quasi-judicial proceedings and held that the district court's finding of deception by Nevada Entertainment Industries, Inc. et al., applied and was amply supported by the record and affirmed the district court's judgment on that basis, and dismissed the City's cross-appeal (i.e. that the civil rights complaint should have been dismissed for lack of "subject matter jurisdiction" under Younger v. Harris, 401 U.S. 37 (1971)) as moot. The Court made no ruling on the City's cross-appeal that the City was entitled to attorney fees. See copy of Memorandum decision at Appendix 6 to this Petition for Writ of Certiorari herein, and compare its earlier ruling on attorneys fee on November 2, 1993 at Appendix pages 3-11.

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7 to this Petition.

On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969, in an attempt to require the Court of Appeals to explain why it had withdrawn its November 2, 1993 opinion which had upheld the cross-appeal by the City re Huffman abstention, and why it had failed, and neglected, and/or refused to apply the rules of law established by the United States Supreme Court, which that opinion held were controlling, as the law of the case on the

City's cross-appeal.

On June 14, 1994, the Court of Appeals denied the City of Henderson's Petition for Rehearing. See Appendix 8 to the Petition for Writ of Certiorari herein.

On June 17, 1994, the City of Henderson moved for leave to file a second petition for rehearing (based upon newly decided authorities: Kokkonnen v. Guardian Life Ins. Co. of America, 54 CCH S.Ct. Bull., p. B1724, decided May 16, 1994). . See copy of Second Petition for Rehearing at Appendix 9.

On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to the Supplemental Brief in Case No. 93-1969.

On July 11, 1994, the Court of Appeals denied the Petition for Rehearing of Nevada Entertainment and the City of Henderson's

motion for leave to file a second petition for rehearing. See Appendix 10 to the Petition for Writ of Certiorari herein.

On July 25, 1994, the Court of Appeals granted Nevada Entertainment's motion to stay the mandate pursuant to Rule 41 (b). See Appendix 11 to this Petition.

On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit, and on August 24, 1994, the Court of Appeals granted the Parties Joint Motion for Order Extending Stay of Mandate. See Appendix 12 to the Petition for Writ of Certiorari herein.

STATEMENT OF THE CASE

In quasi-judicial administrative proceedings, the City of Henderson City Council determined that the Federal Plaintiffs and Respondents herein had

committed fraud in applying for a revenue-based business license, and issued an order revoking their business license. [A business license will not issue unless the intended business operation is located in a proper zone.] See, in this regard, City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. Rather than appeal the City's action within the state court judicial system, as provided for by State law and municipal ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") Section 4.06.160, attached hereto at Appendix 15], the Respondents filed a 42 U.S.C. Section 1983 civil rights action in the United States District Court for the District of Nevada during the pendency of the state license revocation enforcement proceedings, seeking an injunction which would nullify the City Council's Order.

The federal civil rights action was initiated by the Respondents as a defense to the ongoing state license revocation enforcement proceedings. (A classic

"Huffman Abstention" fact situation). The case is before this Court for review on petition for a writ of certiorari on both the "subject matter jurisdiction" issue and the concomitant res judicata and collateral estoppel questions.

On November 2, 1993, the Ninth Circuit Court of Appeals [Browning and Canby, Circuit Judges, Kelleher, Senior District Judge] filed its opinion in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, 8 F.3d 1348 (argued and submitted May 10, 1993 and decided November 2, 1993) in which it awarded judgment to the City on its cross-appeal. The City of Henderson's cross-appeal had argued: (1) that the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) controlled the disposition of the cross-appeal; and (2) that the Younger-Huffman abstention doctrine was predicated upon the 200 year old

Eleventh Amendment and Anti-Injunction Statute, which required a dismissal for lack of "subject matter jurisdiction" and vacation of the District Court's Injunction of 4-years duration which had wrongfully prevented the City Council's quasi-judicial order of license revocation from being implemented. See Petition for Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 at pages 21 thru 65 at Appendix 17 to this Petition for Writ of Certiorari.

However, on April 7, 1994, the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion upholding Huffman-Younger abstention, and on May 4, 1994, filed a memorandum decision holding the Younger abstention issue to be moot!

In this Petition for Writ of Certiorari, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a usurpation of the judicial power, and are void.

Recent decisions of the Ninth Circuit

underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

(A) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Eighteen years ago, Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to any extension of the Younger abstention doctrine in Younger v. Harris, 401 U.S. 37

(1971) to civil cases.

Huffman arose as an attack against a state court's order determining the existence of a public nuisance and involved the use of real property. This type of action was regarded at common law as "in rem," where jurisdiction over the subject matter of the action (the real property or the "res") could only be before one court at a time. On appeal, Appellant's primary argument had been that the trial court lacked "subject matter jurisdiction" of the federal civil rights action which was filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the previous day, November 30, 1972, and the state action and "res" was still "pending" in the state court for post-trial motions, and until the appeal period had expired.

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court lack of

"subject matter jurisdiction" precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, his opinion decided the case solely on the basis of the Younger issue, without ruling explicitly whether Younger was jurisdictional. However, his opinion remanded the case to the federal trial court for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional. While Justice Rehnquist's majority opinion did not address Appellant Huffman's primary lack of "subject matter jurisdiction" contention, it did, however, emphasize the fact that the Huffman Court

was not suggesting "that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18.

Questions 1 and 2 of the Petition herein raise the same two issues of "lack of subject matter jurisdiction" and "estoppel" and "collateral estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record below and Petition herein place before this Court the identical lack of "subject matter jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist,

but was not then before the Huffman Court for decision. Petitioner contends that in the intervening eighteen years, the lack of "subject matter jurisdiction" basis of Huffman has been clearly established and the "res judicata/collateral estoppel" issues which were presented below has been firmly resolved in University of Tennessee v. Elliott, supra.

To the extent that the Real Parties in Interest's civil rights action attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989, such is barred by the abstention doctrine expressed in Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a state to have newly enacted legislation on important state issues, containing a severability clause, construed initially by the state court system. [See Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

Respondents request for a restraining

order and a temporary injunction should have been denied, and the civil rights complaint should have been dismissed at the outset on the City Attorney's reliance on the "clean hands" doctrine that a Court of Equity has no jurisdiction to issue relief to a person who comes into court with dirty hands (a quasi-judicial finding of fraud). Further, on this Petition, the Ninth Circuit is bound by its prior findings of fact and conclusions of law in its Opinion and Judgment filed on November 2, 1993 which, although withdrawn, are still undisturbed and recite that the trial facts are controlled by this Court's ruling in Huffman v. Pursue, Ltd., supra, as explicated by its ruling in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra, and its dicta in New Orleans Public Serv., Inc. v. City Council of New Orleans, supra.

REASONS FOR GRANTING THE WRIT OF CERTIORARI UNDER RULE 10
INTRODUCTION

Rule 10.1(a) and Rule 10.1(c) of the

Rules of the United States Supreme Court provide in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) ...
>
> "(c) A United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

I

<u>WHERE THE ABSTENTION DOCTRINE EXPRESSED IN HUFFMAN V. PURSUE LTD., 420 U.S. 592 IS APPLICABLE, AS HERE, THE FEDERAL COURT MUST DEFER TO THE STATE JUDICIAL SYSTEM AND DISMISS THE</u>

FEDERAL CIVIL RIGHTS COMPLAINT ON THE GROUNDS OF LACK OF SUBJECT MATTER JURISDICTION.

On November 2, 1993, the Court of Appeals in a unanimous decision which was certified and published as 8 F3d 1348 (CA9, 1993) made findings of fact and conclusions of law that the trial facts were analogous to, and controlled by, the facts and law expressed by the U.S. Supreme Court in Ohio Civil Rights Commission v. Dayton Christian School Inc. 477 U.S. 619 (1986) and New Orleans Public Service Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350 (1989) and ruled that the District Court should have abstained on Huffman Abstention, grounds but nevertheless refused to rule specifically on the City's foundational claim that the Court was required to dismiss for lack of subject matter jurisdiction.

The Court of Appeals should also have ruled as a Conclusion of Law, but it did not, that the Complaint must be dismissed for lack of subject matter jurisdiction. Because the subject matter of the Civil

Rights Act was properly before the State Court and could not, under the Eleventh Amendment, be interfered with. World Famous Drinking v. City of Tempe, 820 F2 1079 (CA 9, 1989); See also Petition for Writ of Mandamus (or Certiorari under Rule 11) at "Statement of the Case" at pages 17-21 thru 17-42.

The Court of Appeals Opinion on November 2, 1993 avoided the "subject matter jurisdiction" issue by its use of "language". The entire issue was covered by its ruling reading that:

> "The considerations relied upon in Huffman to support the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted apply equally to state judicial review of the decision in a state administrative proceeding, which is judicial in nature."

By ruling as it did, the Court of Appeals panel (Browning, Canby Jr. and Kelleher) identified itself as belonging to one group of Justices within the Ninth Circuit who are unwilling to apply the Huffman Abstention doctrine in the light of dual restraints of

"subject matter jurisdiction" and the "Eleventh Amendment" considerations. The November 2, 1993 opinion is consistent with that panels statement during oral argument that it did not wish to hear argument on "subject matter jurisdiction".

When the November 2, 1993 Opinion failed to rule upon the "subject matter jurisdiction" issue, Counsel for Nevada Entertainment Industries Inc. recognized immediately the large hole and avenue of escape which had, thereby, been opened in the Huffman Abstention defense and seized that opportunity by filing a Petition for Rehearing on November 30, 1993 in which he construed the Courts silence as meaning that the Court did still have "subject matter jurisdiction" of his Complaint, not with standing Huffman Abstention applied, and constructed a number of obfuscating arguments to advance his claim that the Civil Rights Complaint that he had filed also stated a cause of action upon which the

Court of Appeals might yet render a decision, other than the decision upholding Huffman Abstention. See Statement of Facts herein at pages 35-37. On January 18, 1994, the City filed its Response, see copy at Appendix 4 to this Petition, wherein the City claimed at Appendix 4 pages 4-10 thru 4-21 that the Court of Appeals failure to address the "lack of subject matter jurisdiction" issue and Eleventh Amendment issue were responsible for inviting the type of confusion which customarily appears in Huffman Abstention decisions, and as did, in fact, appear in this Petition for Rehearing.

Through a strange quirk of fate, Counsel for the City pointed out to the Court of Appeals panel a "bottom line fact" of record which, in any event was certain to doom the obfuscating claims which were being advanced in the Petition for Rehearing. See Appendix 4 pages 4-16 and 4-17 reading:

> "If a unilateral 'stipulation' such as this were to give Nevada Entertainment standing to raise the

> constitutional question discussed in footnote 4, it also would lock Nevada Entertainment in a bear trap of greater consequences. No matter what an en banc Court would decide as to the application of Huffman to the narrow trial facts which are of record and the res judicata and/or collateral estoppel effect posed by footnote 4 regarding the City Council's revocation of license on grounds of fraud, it must also consider that part of the federal record below which reflects that Assistant City Attorney Liz Conroy, in opposing the granting of the Temporary Restraining Order on April 27, 1990, specifically made the argument that Licensees were not entitled to any type of equitable relief under 42 U.S.C. Section 1983 because of the principle. 'He who comes into a court of equity must have clean hands' (see Appellees' Answering Brief at page 45), and the United States District Court ultimately applied the 'clean hands' doctrine and refused to acknowledge standing in Nevada Entertainment to consider the other collateral issues framed in the Nevada Entertainment federal lawsuit."

Upon reflection, during the preparation of this Petition for Writ of Certiorari, it now appears to the Counsel of Record that, unwillingly, the above response may have provided the grounds which prompted the Court of Appeal to withdraw its November 2, 1993 Opinion upholding Huffman Abstention and substituting the "clean hands" doctrine as the basis for its May 4, 1994 Memorandum

Opinion.

It is the City's position on this Petition that, for whatever reason, the Court of Appeals orders on April 7, 1994 and Memorandum Opinions on May 4, 1994 were ultra vires acts and grounds for demanding review under Rule 10.1(a) of the Rules of the U.S. Supreme Court as "a decision which has so far departed" from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this courts power of supervision; and under Rule 10.1(c) as a decision on an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Although the Court of Appeals was free to grant the Respondents' Petition for Rehearing, it was not free to <u>arbitrarily</u> ignore its prior findings, without providing some supportable explanation to the parties

as to why the Court reversed its position on the Huffman issue. The Ninth Circuit Court of Appeals is bound by the Findings of Fact and Conclusions of Law which it made and published as 8 F3d. 1348 (CA 9, (1993), notwithstanding the Opinion of November 2, 1993 was withdrawn, Those Findings of Fact and Conclusions of Law remain undisturbed and hold that the principles explained by Chief Justice Rhenquist in Huffman v. Pursue Ltd control, and that the trial facts below are analagous to the trial facts and are controlled by the law, expressed by the U.S. Supreme Court in Ohio Civil Rights Commission v. Dayton Christian Schools Inc., 477 U.S. 619 (1986) and New Orleans Public Serv. Inc. ("NOPSI") v. City Counsel of New Orleans, 491 U.S. 350, 369 (1989) Citing Huffman v. Pursue Ltd, 420 U.S. 592, 608 (1975).

In an attempt to clear up this uncertainty as to why the Court of Appeals withdrew its November 2, 1993 Opinion which

had upheld Huffman Abstention, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari under Rule 11) in this Court on June 6, 1994 which was unsuccessful because this Court refused to issue an Order to Show Cause and refused to issue its peremptory_ Writ. The analytical basis for the City's 4 year claim that Huffman Abstention is grounded upon lack of subject matter jurisdiction was set forth in its analysis at pages 21-65 of its Petition (See Appendix 17-24 thru 17-65 to this Petition for Writ of Certiorari). Subsequent to that filing the Abstention cases of Dubinka v. Judges of the Supreme Court, 23 F3d 218 (April 8, 1994) and Wiener v. County of San Diego, 23 F3d 263 (April 5, 1994) have appeared in the advance sheets and demonstrate quite clearly the merit in the City's claims throughout this litigation that there is a clear split of authority on the Ninth Circuit as to the meaning of Huffman-Younger Abstention; that the correct view is that which is espoused in the

Dubinka analysis, and that the incorrect view is that which is espoused by the Wiener and Henderson decisions.

I(A)

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THE VALIDITY OF THE CITY OF HENDERSON'S CLAIM THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION AND THAT THE COURT OF APPEALS BELOW ERRED IN REFUSING TO DISMISS THE CIVIL RIGHTS LAWSUIT UPON THE "LACK OF SUBJECT MATTER JURISDICTION ISSUE".

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City

claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of certiorari, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In

Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

Judge Browning and the Ninth Circuit Panel erred similarly in the City of Henderson appeal herein in refusing to rule upon the "lack of subject matter jurisdiction" issue, which refusal invited the Nevada Entertainment Industries Inc.'s to file its petition for rehearing and suggestion that the Court rehear the matter enbanc on November 30, 1993. See in this regard, the City's response to that petition for rehearing at Appendix Pages 4-10 thru 4-17, where the City contends that the Court of Appeals continuing failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issues is responsible for the confusion which is flowing from the Ninth Circuit's Huffman decisions, and the

conflict within the Ninth Circuit as examplied by the recent clash between the Wiener, supra, and Dubinka, supra, analysis.

The City of Henderson claims that the analysis in Wiener v. County of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state

court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away with the confusion which is presently generated in the race to the Courtroom.

I(B)

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the failure of the County Counsel to focus upon the importance of the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387

(1941). The City contends that, as a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute San Diego County ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective).

Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County of San Diego was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because, as in this City of Henderson situation, the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al. v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and

support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court, including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix __ page 7-7 et seq. of the Supplemental Brief in Case No. 93-1969 and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights

plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications,

involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to set up a Constitutional "collision course."

I(C)

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to the Petition for Writ of Certiorari herein is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman

challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

Dubinka clearly establishes that the Ninth Circuit's analysis and orders on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level, and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Certiorari should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Certiorari under

Rules 10.1(a) and 10.1(c) of the United States Supreme Court.

CONCLUSION

For all of the above reasons, the Judgment of the Court of Appeals and Memorandum Decision filed May 4, 1994 should be reversed and the case remanded with instructions (1) to reinstate the Opinion and Judgment which was entered on November 2, 1993; (2) on the grounds that the Court lacked subject matter jurisdiction in accordance with the analysis in Dubinka v. Judges of the Superior Court, 23 F3d 218 (April 8, 1994); and (3) finding that the City of Henderson is entitled to move in the U.S. District Court for a reasonable attorney fee under 42 U.S.C. section 1988 as the prevailing party on the issues of Huffman Abstention and lack of subject matter jurisdiction.

Further the May 4, 1994 Order of Dismissal of the Preliminary Injunction against the City upon an independent

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

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[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs'

(Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) JUDGMENT [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

LLOYD D. GEORGE
United States District Judge

APPENDIX 2

Order of the United States Court of Appeals for the Ninth Circuit (Noonan and T.G. Nelson, Circuit Judges), continuing Preliminary Injunction pending disposition of Appeal, filed December 22, 1992. [Reference: When examined in the light of the Ninth Circuit Opinion on November 2, 1993 (Appendix 3), was this a violation of the Eleventh Amendment and Huffman Abstention by the U.S. Court of Appeals.]

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[Filed Dec. 22, 1992;
Catterson, Clerk,
Court of Appeals]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al.,	No. 92-17054
	DC # CV-90-00264-LDG Nevada (Las Vegas)
Plaintiffs-Appellants,	ORDER
vs.	
CITY OF HENDERSON, a Nevada municipal corporation, et al.,	
Defendants-Appellees.	

Before: NOONAN and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is denied. Appellants' emergency motion for an injunction pending appeal is granted. The district court's November 25, 1992 order is stayed and the district court's June 5, 1990 preliminary injunction against appellees

shall remain in effect pending disposition of this appeal.

The appeal shall be expedited as follows. Appellants shall secure the filing of the certificate of record by January 11, 1993. Appellants' opening brief is due January 25, 1993. Appellees' response brief is due February 22, 1993. Appellants' optional reply brief, if any, is due March 1, 1993.

Absent extraordinary circumstances, no extensions of time for filing of the briefs will be entertained by the court. All subsequent filings in this matter shall be served on the court and on all parties by hand delivery or by overnight delivery service. The Clerk shall set this matter for argument in San Francisco during the week of April 12, 1993.

MoCal 12/21/92

APPENDIX 3

Ninth Circuit Opinion filed November 2, 1993 and reported at 8 F.3d 1348 (CA 9, 1993) but withdrawn on April 7, 1994 which adhered to the U.S. Supreme Court Decisions in New Orleans Pub., Serv., Inc. (NOPSI) v. City Counsel of New Orleans 420 U.S. 592, 608 (1975) and Ohio Civil Rights Commission v. Dayton Christian School, Inc., 477 U.S. 619 (1986) and upheld the City's contention on cross-appeal of the Decision and Final Judgment of the District Court in Nevada Entertainment Industries, Inc. v. City of Henderson et al., that the Huffman abstention doctrine applied. [Reference: First Opinion of the United States Court of Appeals upholding the City's contention that the Huffman abstention doctrine applied in the City's Cross-Appeal.]

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,
Defendants-Appellees-Cross-Appellants.

Nos. 92-17054
93-15052

D.C. No.
CV-90-00264-LDG

OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
May 10, 1993—San Francisco, California

Filed November 2, 1993

Before: James R. Browning and William C. Canby, Jr.,
Circuit Judges, Robert J. Kelleher,* Senior District Judge.

Per Curiam

*The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Jurisdiction/Administrative Law

The court of appeals reversed a district court decision and remanded. The court held that the district court was required to abstain from exercising jurisdiction over a plaintiff's claim challenging the constitutionality of a zoning ordinance when the plaintiff had not sought review in state court of a City Council order revoking its business license.

Appellant Nevada Entertainment Industries, Inc. applied for a license to operate an adult video store in Henderson, Nevada. Appellee City of Henderson's zoning ordinance limited such businesses to certain zones, of which it contained none. After Nevada Entertainment applied for and was issued a license to operate a general video store, it opened an adult video store. The City commenced a proceeding to revoke Nevada Entertainment's license. The City Council issued an order revoking the license.

Rather than appealing the order to the state district court, Nevada Entertainment filed suit in federal court, challenging the constitutionality of the city's zoning ordinances. The City argued that the district court was required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), which requires abstention when state proceedings, judicial in nature, (1) are pending, (2) involve important state interests, and (3) afford an adequate opportunity to raise the constitutional issue. The district court rejected the abstention claim, but granted judgment for the City. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain.

[1] The considerations relied upon by the Supreme Court in an earlier case, supporting the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted, apply equally to state judicial

review of the decision in a state administrative proceeding, which is judicial in nature. [2] Moreover, it is consistent with *Younger* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, when adequate state judicial review was available to the federal plaintiff. Because the administrative proceeding in this case was coercive and brought by the state to enforce its laws, *Younger* required the federal court to abstain from intervening unless and until that proceeding, including review by the state court, was complete. Since Nevada Entertainment did not pursue its appellate remedy, the proceeding remained pending, for *Younger* purposes, at the time of the federal suit.

COUNSEL

Roger Jon Diamond, Santa Monica, California, for the plaintiffs-appellants-cross-appellees.

James J. Clancy, Sun Valley, California, for the defendants-appellees-cross-appellants.

OPINION

PER CURIAM:

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and since no such zone existed, Nevada Entertainment would have to apply for a zone change or variance as well as a con-

ditional use permit. Instead, Nevada Entertainment filed a new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment misrepresented the nature of the business it intended to open. The City Council issued an order revoking the license. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We conclude the district court was required to abstain under *Younger*.

ABSTENTION

We consider *de novo* whether *Younger* abstention was required. *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987). *Younger* abstention is required when: (1) state proceedings, judicial in nature, are pending; (2) the state proceedings involve important state interests; and (3) the state proceedings afford adequate opportunity to raise the constitutional issue. *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Where *Younger* abstention is applicable, " 'a district court must dismiss the federal action.' " *World Famous Drinking Emporium*, 820 F.2d at 1081 (quoting *Fresh Inter-*

national Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1356 (9th Cir. 1986)).

1. *Pending State Court Proceedings*

When Nevada Entertainment filed this action, the administrative proceeding before the City Council revoking Nevada Entertainment's license was complete. Nevada Entertainment had ten days within which to appeal the Council's order to the Nevada district court. It did not do so, but instead filed this suit under 42 U.S.C. § 1983 challenging the constitutionality of the city's ordinance and seeking injunctive relief. The issue is whether a state administrative proceeding of a kind subject to *Younger* is pending within the meaning of *Younger* when the administrative process has been concluded but judicial review in state court is available.

Ordinarily, when judgment has been entered for the state in a state trial court proceeding to which *Younger* applies, "a party may not procure federal intervention by terminating the state judicial process prematurely — forgoing the state appeal to attack the trial court's judgment in federal court." *New Orleans Pub. Serv., Inc. ("NOPSI") v. City Council of New Orleans*, 491 U.S. 350, 369 (1989) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975)). As the Court said in *Huffman*, federal intervention "is likely to be even more disruptive and offensive [at this point] because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement." 420 U.S. at 608-09.

Huffman, however, involved failure of the federal plaintiff to appeal a lower court judgment rather than failure to seek judicial review of an order entered in a state administrative proceeding. *Younger* plainly applies to state administrative proceedings, which are judicial in nature, *Middlesex*, 457 U.S. at 432-34, as was the license revocation proceeding involved in this case, but the Supreme Court has not expressly held that

Huffman applies if the federal plaintiff has foregone available state court judicial review of the decision in an administrative proceeding.

The holding in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), and dicta in *NOPSI* strongly suggest that a state administrative proceeding and state judicial review of that proceeding are a single unitary process for *Younger* purposes and federal court intervention cannot be obtained without first exhausting the state court appellate remedy. In *Dayton Christian Schools*, Dayton sought to enjoin a state administrative proceeding brought against it to enforce the state's anti-discrimination laws. The issue was whether Dayton could raise its Free Exercise and Establishment Clause claim in the administrative proceeding. The Supreme Court concluded appellant probably could raise its constitutional claim before the Ohio Civil Rights Commission, but held that even if Ohio law precluded the Commission from considering such claims, "it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* at 629. Since under this holding *Younger* applies to a pending administrative proceeding even though constitutional claims cannot be raised until state court review, there is no reasoned basis for holding that litigants in such proceedings may forego state court review of the administrative decision in favor of a federal lawsuit.

In *NOPSI*, the Court assumed, without deciding, that *Dayton Christian Schools* requires the state administrative proceedings and judicial review of such proceedings be treated as a unitary process that is not to be interrupted by federal court intervention, any more "at the conclusion of the administrative stage than during it." *NOPSI*, 491 U.S. at 369. The Court noted "[t]he fact that *Dayton Christian Schools* relied, as an alternative argument, upon the fact that the federal challenge could be made upon appeal to the state courts, . . . suggests, perhaps, that an administrative proceeding to

which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." *Id.* at n.4.[1]

[1] The considerations relied upon in *Huffman* to support the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted apply equally to state judicial review of the decision in a state administrative proceeding, which is judicial in nature.

Dayton Christian Schools rejected the suggestion that requiring a litigant, asserting violation of constitutional rights, to pursue judicial review of a state administrative proceeding as a precondition to federal court intervention under 42 U.S.C. § 1983 is inconsistent with the holding in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982), that § 1983 plaintiffs need not exhaust state administrative remedies. The Court said:

> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy* . . . , which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975). Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton Christian Schools, 477 U.S. at 628 n.2. *See also Patsy*, 457 U.S. at 518-19 (White J., concurring) (the holding in *Patsy* is "fully consistent with [the] decisions that a defendant in a civil or administrative enforcement proceeding may

[1]The Court did not decide the question, concluding instead *Younger* did not apply because the administrative proceeding at issue in *NOPSI* was legislative rather than judicial in nature. *Id.* at 369-370.

not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court") (citing *Huffman*).

The crucial distinction between *Dayton Christian Schools* and *Patsy* is that in *Patsy* the administrative proceeding was a remedial action instituted by plaintiff to redress a wrong inflicted by the state, while *Dayton Christian Schools* involved an administrative proceeding initiated by the state to enforce a violation of state law.[2] As the Seventh Circuit has pointed out, the latter situation invokes primary reasons for *Younger* abstention:

> [*Younger's*] central meaning is that a federal district court may not, save in exceptional circumstances, enjoin, at the behest of a person who has actually or arguably violated a state statute, a state court proceeding to enforce the statute against that person. (internal citation omitted). His remedy is to interpose his federal claims as a defense in that action.
>
> . . .
>
> The state normally is entitled to prosecute or otherwise proceed against the violators of its laws in its own courts without interruption by a federal district court. But the principle [that a § 1983 plaintiff may

[2]Courts of Appeals of four circuits have considered the problem with varying results. *See Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990) (*Younger* abstention requires litigant to seek available state court review of administrative proceedings); *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987) (no state court proceeding pending if administrative proceeding is concluded, even if state court review of constitutional claims is available); *Alleghany Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990) (*Younger* requires a litigant to seek state court review of an administrative proceeding if the administrative proceeding was brought by the state to enforce a violation of state law), *vacated as moot*, 499 U.S. 933 (1991); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987) (same).

> initiate remedial action to enjoin unconstitutional state official conduct] stands unimpaired in cases in which the federal plaintiff has not violated state law, has not exposed himself to a state enforcement proceeding, is not a defendant in such a proceeding, but merely seeks to sweep away an illegal obstacle to his activities.

Alleghany Corp. v. Haase, 896 F.2d 1046, 1050-51 (7th Cir. 1990), *vacated as moot*, 111 S. Ct. 1383 (1991).

[2] In cases such as *Dayton Christian Schools*, it is the state administrative proceeding itself that plaintiffs seek to challenge. "Comity and federalism concerns are at their highest in such cases since the legitimacy of both the state proceeding and its underlying statutory predicate are at stake." *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260 (1st Cir. 1987).[3] It is consistent with both *Younger* and *Patsy* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, where adequate state judicial review was available to the federal plaintiff. The City Council initiated the administrative proceeding in this case to enforce municipal code provisions requiring license applicants to complete applications truthfully. Because the administrative proceeding was coercive and brought by the state to enforce its laws, *Younger* required the federal court to abstain from intervening unless and until that proceeding, including review by the state court, was complete. Since Nevada Entertainment did not pursue its appellate remedy, the

---

[3]In *Kercado-Melendez*, the First Circuit, like the Seventh Circuit in *Haase*, held abstention was not required under *Younger* where the state administrative proceeding was a remedial action initiated by the federal plaintiff. However, in *Kercado-Melendez*, the administrative action was initiated by the state in response to an alleged violation of its laws. *See* 829 F.2d at 267-68 (Breyer, J., dissenting). We express no view on this precise situation.

proceeding remained pending, for *Younger* purposes, at the time of the federal suit.[4]

2. *Opportunity to Raise the Constitutional Claims*

Nevada Entertainment attempted to raise its constitutional claims in the revocation hearing, but the City Council refused to listen.[5] Whether the federal claim could have been raised in the administrative proceeding is of no moment, however, if it could have been raised in subsequent state court judicial review. *Dayton Christian Schools*, 477 U.S. at 629.

The relevant provisions of the Henderson Municipal Code are set out in the margin.[6] The district court held that under the Code the state court could review only "the specific rulings on questions of law which the petition contends constitutes error," and that, by refusing to rule on Nevada Entertainment's constitutional claims, the City Council could and did preclude state court review of these claims (quoting H.M.C. § 4.06.160(a)). When read in full, however, the sentence in subsection (a) upon which the district court relied

---

[4]Nevada Entertainment cites only *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), in support of its contention that a federal plaintiff need not exhaust available state judicial review of a state administrative order before seeking injunctive intervention under § 1983. There is nothing in *City of Cincinnati* to indicate abstention was sought or whether the requirements for abstention were present.

[5]The Mayor stated: "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to decide."

[6]§ 4.06.160 of the Henderson Municipal Code reads:

> Any person aggrieved by a final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court.
>
> (a) . . . . The petition for review shall set forth the order or decision appealed from, and shall set forth the specific rulings on questions of law which the petition contends constitutes error.

does not qualify the general grant of authority to review all questions of law found in the opening sentences of the provision; it simply directs the petitioner to set forth in his petition the rulings he appeals. Nothing in the Code precludes a petitioner from claiming that a "specific ruling" of the City Council "constitutes error" because it violates the Constitution, even if the City Council refused to address that question. We conclude the Municipal Code provided appellant an adequate opportunity to raise its federal claim on review in state district court.

3. *Important State Interest*

The state has an important interest in enforcing licensing schemes such as that at issue here. *See World Famous Drinking Emporium*, 820 F.2d at 1082-83. More significantly, the "importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman*," *Middlesex*, 457 U.S. at 432; and we add, as in this case.

ATTORNEYS FEES

The City argues it should have been awarded attorneys fees under 42 U.S.C. § 1988. Prevailing defendants in civil rights actions are awarded attorneys fees only in "exceptional cases." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 202 (9th Cir. 1988). *See also Hughs v. Rowe*, 449 U.S. 5, 14 (1980) (district court has discretion to award attorneys fees to a prevailing defendant under § 1988 where "the plaintiff's action . . . is groundless or without foundation"). The district court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal.

CONCLUSION

The decision of the district court refusing to abstain from exercising jurisdiction is REVERSED and the case is

REMANDED to the district court with instructions to vacate its judgment and dismiss the complaint.

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APPENDIX 4

Response of City of Henderson to Petition for Rehearing and Suggestion for Rehearing En Banc of Nevada Entertainment Industries, Inc. [Reference: In its reponse at Appendix pages 4-16 and 4-17 the City of Henderson reminded the Court of Appeal of the 'bottom line" record "fact" that Assistant City Attorney Liza Conroy had unsuccessfully cited the Equity "Clean Hands" doctrine and the City Council's "Fraud" findings at the initial hearing on the TRO, as a basis for one of the City's claims the federal court lacked subject matter jurisdiction. Shortly thereafter, the Court of Appeals utilized that "lack of subject matter jurisdiction" ground in its memorandum decision of May 4, 1994 to deny the City's its right to an award as the prevailing defendant on its cross-appeal, under existing U.S. Supreme Court precedent, to a final judgment on the Huffman Abstention!]

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JAMES J. CLANCY (State Bar. No. 26946)
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Attorneys for Defendants/Appellees
and Cross-Appellants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR A REHEARING EN BANC.... 1

CONCLUSION..... 7

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Ex Parte Young,
209 U.S. 123 (1908)..... 5

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975)..... 2, 3, 4, 5, 7, 8, 9

Louisiana v. Jumel,
107 U.S. 711 (1883)..... 3

Nevada Entertainment Industries, Inc. v. City of Henderson,
8 F.3d 1348 (1993)..... 2, 7

New Orleans Public Service v. City Council of New Orleans,
491 U.S. 350 (1989)..... 4, 6, 7

Watson v. Buck,
313 U.S. 387 (1941)..... 6

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985)..... 6

STATE CASES

Las Vegas v. Nevada Entertainment, Inc.
772 P.2d 1275 (Nev.S.Ct., 1989)..... 3

CONSTITUTIONAL PROVISIONS

United States Constitution
Tenth Amendment..... 2, 8
Eleventh Amendment.....2, 3, 4, 8

FEDERAL STATUTES

42 U.S.C. Section 1983..... 5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Comes now the City of Henderson, a Nevada Municipal Corporation and James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") to file its response to the Petition of Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop (hereinafter "Nevada

Entertainment") for Rehearing and Suggestion for Rehearing en Banc, as required by this Court's Order, filed December 27, 1993.

City of Henderson respectfully invites this Court's attention to the fact that this Court, in its three judge panel opinion on November 2, 1993, did not deem it necessary to specifically address[1] the analytical argument re "Huffman" that the City of Henderson has urged continuously in the past three years of litigation and in its Opening and Reply briefs and oral argument in

---

[1] See Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348, at 1350 ["The consideration relied upon in Huffman to support the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted apply equally to state judicial review of the decision in a state administration proceeding, which is judicial in nature."

this appeal. In such litigation, the City has insisted that, from an analytical standpoint, the abstention doctrine expressed by the United States Supreme Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (involving a civil public nuisance abatement lawsuit filed by the State) was grounded in subject matter jurisdiction and the Tenth and Eleventh Amendment to the Federal Constitution, and that the United States Supreme Court fashioned the Huffman rule for the guidance of federal District Courts and as a precaution, to assure that the federal system, under its civil rights jurisdiction, would not interfere in a civil case such as this license revocation hearing brought by the City of Henderson, acting for the State in the State judicial system against a resident where, to do so, might (in the future) operate in a fashion which would result in a Tenth or Eleventh Amendment

interference with and violation of State Powers under the Federal Constitution. See Appellees' Opening and Answering Briefs, at page 6, line 12 through page 7, line 26, and Reply Brief, at page 1, line 19 through page 5, line 20.

In both briefs (see Opening Brief at page 38, line 16 through page 40, and Reply Brief at page 5, line 9 through page 6, line 26), and at oral argument, the City of Henderson argued that the District Court's fact findings on the merits that Nevada Entertainment's conduct was fraudulent acted retrospectively to corroborate[2] the

---

[2] The District Court's Findings proved that the City Council's actions were not ultra vires. It is hornbook law that, under the Eleventh Amendment, a citizen may not sue the State in federal court, and that he may do so pursuant to a 42 U.S.C. Section 1983 civil rights lawsuit only if the State is deemed to be acting "ultra vires." The City's acts were not ultra vires.
(Footnote Continued)

City's claims that: (1) Huffman did control; and (2) the federal court's assumption of jurisdiction over and interference with a state matter was wrongful; and (3) the State of Nevada and the City of Henderson, acting for the State (which had the right to assert the Constitutional bar of the Eleventh Amendment, since the relief sought in the federal action would require City officials, as officers of the state, to act contrary to the positive orders of the supreme political power of the State, whose creatures they are [see Louisiana v. Jumel, 107 U.S. 711, at 721

(Footnote Continued)
Under Nevada law, cities are empowered to act for the State, and are authorized to issue business licenses within the City and to revoke the same as to fraudulent applications, where such are found to be fraudulent by the City Council, sitting as a quasi judicial fact finder in the state judicial system. See City of Las Vegas v. Nevada Entertainment, Inc., 772 P.2d 1275 (Nev. S.Ct., 1989). (Our Emphasis.)

(1883)], has suffered an actual Eleventh Amendment injury for the past three years, which, in no way, could be compensated for by any monetary award from Nevada Entertainment.

Because this Court, in its November 2, 1993 opinion, did not find it necessary to address the City of Henderson's analysis as to the "lack of jurisdiction" basis of Huffman, Nevada Entertainment now seizes upon this Court's silence on that issue and makes a new and bolder claim as though "lack of jurisdiction" were not at the crux of the Huffman abstention doctrine. They now argue, in effect, that "Granted that the City acted properly in revoking Nevada Enterprises license for fraud in connection with its application, it is really of no moment that the City of Henderson has suffered an Eleventh amendment infringement by virtue of such federal interference [an injunction

prohibiting enforcement of Nevada Law, i.e.: operating a business without a license is a misdemeanor.] Further, Nevada Entertainment is again renewing its efforts to scuttle the Huffman rule by conceding the finality of the fact finding by the City Council in an effort to bring themselves within the unexplored parameters of Footnote 4 of New Orleans Public Service v. City Council of New Orleans, 491 U.S. 350 (1989), in order to support its contention that the remaining allegations stated a good cause of action for the District Court's consideration. They now ask an "en banc" Court to circumvent the Huffman doctrine by ruling that the City of Henderson has "consented" to federal jurisdiction -- in the face of: (1) the City's three year's dogmatic stance to the contrary, which entailed two trips to the Court of Appeals and two trips to

the United States Supreme Court, and (2) the City of Henderson's claim for attorneys fees as a prevailing defendant on the grounds that Nevada Entertainment's federal lawsuit was blatantly violative of the Huffman Doctrine and notoriously improper inasmuch as their attorneys were experienced "adult business" attorneys who were well aware as to what the United States Supreme Court intended by its decision in Huffman and what was at stake (i.e. the jurisdictional basis for Huffman). For three years its attorney have shrewdly remained silent, and refused to carry out their duty to provide the trial court with legal research and rebuttal argument to the City's analysis re jurisdiction in the City's briefs.

In essence, Attorney Diamond is now proposing that an en banc majority of this Court should avoid the Huffman

abstention doctrine (which was correctly applied by the three-judge panel) by making a new and different finding that the City "consented" to federal jurisdiction. Analytically, this new and different claim by Nevada Entertainment cannot be reconciled with the record below which is before this Court.

If the City of Henderson acted within the scope of its authority in conducting the license revocation hearing and in revoking the license, as Nevada Entertainment apparently is now willing to acknowledge, then it must necessarily follow that no federal cause of action has been stated or can be maintained because: (1) the City was not involved in an ultra vires act and (2) there was no Civil Rights violation to support federal jurisdiction in that the essential "Ex Parte Young" [209 U.S 123 (1908)] allegation is lacking for

federal jurisdiction under 42 U.S.C. Section 1983. It also follows therefrom that, as suggested by Justice Kelleher at oral argument, Nevada Entertainment lacks standing to attack the remaining statutes for a number of reasons: First, it had not applied for the right to operate a conditional use, etc.[3] Further, those newly enacted ordinances have not been given an initial interpretation by the Nevada State Court, and the federal court's consideration of the same was barred by

---

[3] Judicial review was premature, presenting a "ripeness" problem, since the federal plaintiffs had not obtained any administrative decision, final or otherwise, regarding the application of the Ordinances in question to their property. The question of whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable, see Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

Watson v. Buck, 313 U.S. 387 (1941). See City of Henderson's Opening and Answering Brief, at pages 3, 22, 28, 34, and 36. Finally, an even greater (and insurmountable) barrier is the federal trial Court's express fact finding on the merits that, as found by the City Council, the Appellant was guilty of fraud in its application for the license, and was barred, by the "clean hands" doctrine from obtaining a consideration as to the Constitutionality of the other ordinances in the federal system.

This sudden switch in argumentation and willingness to stipulate that the state license revocation proceedings, together with the fact finding of fraud had been finalized at the time Nevada Entertainment filed their federal civil rights lawsuit, is an attempt to bring appellant Nevada Industries within the parameters of footnote 4 of New Orleans

Public Service v. City Council of New Orleans, 491 U.S. 350 (1989), in which the High Court noted that it had not spoken definitively on the application of the Huffman abstention doctrine in situations where the state administrative proceedings had been finalized at the time the federal complaint was filed. If a unilateral "stipulation" such as this were to give Nevada Entertainment standing to raise the constitutional question discussed in footnote 4, it also would lock Nevada Entertainment in a bear trap of greater consequences. No matter what an en banc Court would decide as to the application of Huffman to the narrow trial facts which are of record and the res judicata and/or collateral estoppel effect posed by footnote 4 regarding the City Council's revocation of license on grounds of fraud, it must also consider that part of the federal record below

which reflects that Assistant City Attorney Liz Conroy, in opposing the granting of the Temporary Restraining Order on April 27, 1990, specifically made the argument that Licensees were not entitled to any type of equitable relief under 42 U.S.C. Section 1983 because of the principle, "He who comes into a court of equity must have clean hands" (see Appellees' Answering Brief at page 45), and the United States District Court ultimately applied the "clean hands" doctrine and refused to acknowledge standing in Nevada Entertainment to consider the other collateral issues framed in the Nevada Entertainment federal lawsuit.

CONCLUSION

Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so

far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.

The City of Henderson in this regard, however, makes these further contentions:

(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong probability that the assumption of federal jurisdiction would lead to the type of Tenth and

Eleventh Amendment infringement of state powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that

if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, neverthless, recklessly continued such litigation by remaining silent and

refusing to address the City's arguments on the jurisdictional aspects.

Dated: January 16, 1994

Respectfully submitted,

James J. Clancy
For Defendants,
Appellees &
Cross-Appellants

APPENDIX 5

Order of the Court of Ap
Ninth Circuit, dated Ap
withdrawing its Opi
November 2, 1993. [Ref
City of Henderson conten
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subject matter jurisdi
Huffman principles a
(supra) see Appendix 9B)

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,
Defendants-Appellees-Cross-Appellants.

Nos. 92-17054
93-15052

D.C. No.
CV-90-00264-LDG

ORDER

Filed April 7, 1994

Before: James R. Browning and William C. Canby, Jr., Circuit Judges, and Robert J. Kelleher,* Senior District Judge.

ORDER

The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (9th Cir. 1993) is withdrawn.

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*The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

APPENDIX 6

Memorandum Decision of the Court of Appeals for the Ninth Circuit filed on May 4, 1994. holding the City's right to a Judgment on its cross-appeal based upon Huffman abstention was moot. [Reference: The City of Henderson contends this decision is an act in excess of the Court's subject matter jurisdiction under Huffman principle and Kokkonen, supra, see Appendix 9B).]

[Filed May 4, 1994; Cathy A. Catterson, Clerk, U.S. Court of Appeals]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al.,	Nos. 92-17054 93-15052
Plaintiffs/ Appellants/ Cross-Appellees,	D.C. No. CV-90-00264-LDG
	MEMORANDUM*
CITY OF HENDERSON, a Nevada Municipal Corporation et al.	
Defendants/ Appellees/ Cross-Appellants.	

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted May 10, 1993

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

San Francisco, California

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,** Senior District Judge.

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and, since no such zone existed, it would have to apply for a zone change or variance as well as a conditional use permit. Instead, Nevada Entertainment filed a

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**The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment then opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment had misrepresented the nature of the business it intended to open. After a hearing, the City Council issued an order revoking the license because of the misrepresentation in Nevada Entertainment's application. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under Younger v. Harris, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground that under Dennis v. United States, 384 U.S. 855 (1966), Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We affirm the judgment of the district court on the basis of Dennis and dismiss the cross-appeal as moot.

I. NEVADA ENTERTAINMENT'S APPEAL

The district court properly declined to consider the constitutionality of the ordinances. "One who elects [to commit fraud] as a means of self-help may not escape the consequences by urging that his conduct

be excused because the statute which he sought to evade is unconsitutional." Dennis, 384 U.S. at 867; see also Ancafora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (teacher could not challenge dismissal on the basis of discrimination where he was dismissed because he lied on his application). Nevada Entertainment's license was not revoked because of the nature of its business activity, but rather because Nevada Entertainment's application misrepresented the nature of its business.

Nevada Entertainment argues the district court should not have relied on Dennis because the issue of fraud was "never pleaded nor briefed." However, the federal complaint for declaratory and injunctive relief specifically alleged "[p]laintiffs made no material misrepresentations on their application," and the City's answer

denied the truth of this allegation. As the district court recognized, the City contended throughout the litigation that the constitutionality of the ordinances was not at issue since "the plaintiffs' ... license was revoked because of their own fraud, not because of the nature of their business." The stipulated record on which the case was tried in the district court included transcripts of the city council hearing, which was devoted exclusively to the issue of fraud. Nevada Entertainment had adequate notice that its fraudulent conduct was one of the issues in the case.

Nevada Entertainment also argues the administrative record is insufficient to support the district court's finding of fraud because there was no opportunity to present "affirmative evidence" to support the contention that it was "induced" to

falsify the license application. However, the testimony on which Nevada Entertaiment relies to support this inducement argument was in the record before the district court, and Nevada Entertainment does not point to any additional evidence in support of its argument or suggest it would have been barred from presenting such additional evidence to the city council. The district court's finding of deceptive conduct is amply supported by the record.

Nevada Entertainment argues that even if its conduct were deceptive, the district court should have allowed some "deception" to permit Nevada Entertainment to position itself to challenge the constitutionality of the ordinances. Nevada Entertainment offers no reason why it could not simply have challenged the denial of the original

application rather than submitting a second, fraudulent application.

II. THE CITY'S CROSS-APPEAL

The City cross-appealed arguing Nevada Entertainment's entire action should have been dismissed under Younger. Since the City has prevailed in the district court and on appeal, any discussion of the City's argument would be advisory. See Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 853-54 (9th Cir. 1985). We decline to reach the abstention issue and dismiss the cross-appeal as moot.

The judgment of the district court if AFFIRMED. The City's cross-appeal is DISMISSED as moot.

APPENDIX 7

City of Henderson's Petition for Rehearing, filed May 18, 1994.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

PETITION FOR REHEARING..... 1

INTRODUCTION..... 2

FACTS AND LAW WHICH THE COURT OVERLOOKED..... 2

AN APPARENT CONFLICT WITH ANOTHER DECISION OF THIS COURT..... 2

RE NEW ISSUE RAISED IN MEMORANDUM DECISION..... 2

RE NEW ISSUE RAISED IN MEMORANDUM DECISION..... 3

ARGUMENT..... 3

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Aiona v. Judiciary of the State of Hawaii, 17 F.3d 1244 (1994).....2, 3, 7, 8, 9, 10, 11, 12, 14

Fresh International Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir., 1986).....14

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 2, 3, 5, 6, 7, 8, 10, 11, 12, 13

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)..... 3, 10

Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 94 DJ DAR 2055..... 15

World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987).....11

CONSTITUTIONAL PROVISIONS

United States Constitution
Tenth Amendment.....6, 7, 8
Eleventh Amendment.....5, 6, 7, 8

FEDERAL STATUTES

42 U.S.C.
Section 1983..... 4, 5, 13
Section 1988.....11

FEDERAL RULES

Ninth Circuit Rules,
Rule 36-3..... 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

PETITION FOR REHEARING

TO THE CLERK OF THE COURT:

The City of Henderson, et al. petition the Court to vacate its order of April 7, 1994 and decision of May 4, 1994, in order to reconsider the City's Cross-appeal and whether the issues presented therein are moot, in light of certain material facts and law

overlooked by the Court, and an apparent conflict with another Decision of this Court; and to reexamine its order that said memorandum "is not appropriate for publication and may not be cited.

Respectfully submitted,

_____

James J. Clancy
For Defendants/Appellees,
and Cross-Appellants

INTRODUCTION

City of Henderson, a Nevada Municipal Corporation, et al., Defendants/Appellees and Cross-Appellants (hereinafter "City of Henderson") petition the Court for a rehearing on the following grounds:

FACTS AND LAW WHICH THE COURT OVERLOOKED

1. Material points of fact and law are overlooked in the Court's Memorandum decision of May 4, 1994, and in this Court's decision on November 2, 1993 which applied the law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which was withdrawn by its Order, dated April 7, 1994.

AN APPARENT CONFLICT WITH ANOTHER DECISION OF THIS COURT

2. The law expressed in this Court's November 2, 1993 opinion, which was withdrawn [with respect to the applicabilty of Huffman to the fact situation of record herein], conflicts

with the law expressed by another panel of the Ninth Circuit in Aiona v. Judiciary of the State of Hawaii, argued and submitted November 1, 1993, and decided March 3, 1994, which also applied Huffman, but in a different manner, which opinion was published in the 17 F.3d, Vol. No. 2 advance sheets (at 1244) dated April 25, 1994, and received in the May 9, 1994 mail. Said conflict with respect to the application of the Huffman test (rule of law), expressed in the Aiona case, was not addressed in this Court's opinions.

RE NEW ISSUE RAISED IN MEMORANDUM DECISION

3. This Court's order at page 1 of its memorandum decision filed May 4, 1994, that said disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3, as applied to the

trial facts and law applied in this cause, contravenes due process and equal protection of the law principles expressed in the federal constitution and Common Law "precedent," which is dependent upon and developed by a comparison and resolution of the conflicts in such cases.

RE NEW ISSUE RAISED IN MEMORANDUM DECISION

4. The City's cross-appeal is not moot as held in this Court's memorandum decision, for all of the reasons stated in 1-3 above.

ARGUMENT

The City of Henderson petitions this Court:

(1) to vacate its order of April 7, 1994, which granted the Petition for Rehearing of Plaintiffs/Appellants/ Cross-Appellees (hereinafter "Nevada Entertainment") and withdrew its opinion (filed on November 2, 1993, and reported

at 8 F.3d (9th Cir. 1993), which cites the Huffman case and holds it to to be a controlling "precedent," as was argued in the City of Henderson Cross-Appeal. The November 2, 1993 opinion should be amended to conform to the law expressed in Aiona; specifically, its holding that "a District Court must dismiss the federal action...and there is no discretion to grant injunctive relief;" and

(2) to vacate the Court's memorandum decision of May 4, 1994, which adverts to certain (but not all) of the trial facts which were before the U.S. District Court, and affirms the U.S. District Court's Judgment on an incomplete and erroneous recital of trial facts, without also considering the following omitted facts which appear in the appellate record in this Court, the most important of which is the fact that an injunction was issued by the

U.S. District Court and is presently in force as is the surety bond of $10,000, which was filed by Nevada Title.

FIRST: At the outset of Nevada Entertainment's Civil Rights lawsuit under 42 U.S.C. Section 1983, the U.S. District Court erroneously issued, over the City of Henderson's objections, both:

(1) a temporary restraining order on April 27, 1990, and

(2) a preliminary injunction on June 4, 1990, which injunction is still in effect, having been continued pending disposition of this appeal by order of this Court, dated December 22, 1992).

The Federal Courts have, for a period of approximately four years barred the City from applying the laws of the State of Nevada with respect to issuance and enforcement of a quasi-judicial administrative order relating to a

license revocation proceeding before the Henderson City Council, which was coercive in nature. Said state order:

(a) was subject to appeal in the state court system, and review thereof was "pending" in the state system, when the Civil Rights Complaint was wrongfully filed by Nevada Entertainment for the purpose of interfering with the Nevada proceedings in contravention of the Eleventh Amendment, and

(b) became final and fully enforceable under Nevada state law, well before the occurrence of the U.S. District Court trial of said Civil Rights Complaint, in which the issues of fraud and the propriety of the City's actions with respect to license revocation were relitigated, in contravention of the Eleventh Amendment to the U.S. Constitution.

Since the quasi-judicial order was not appealed in state court, it became final and is fully enforceable under Nevada state law, and was entitled to recognition by the U.S. District Court, and by this Court of Appeal, in that:

(1) The City Council's quasi-judicial order had been lawfully rendered and should have been regarded by the federal courts as res judicata and/or collaterally estopping the Federal Plaintiffs; and

(2) Federal injuctive power here has been wrongfully used to enjoin enforcement of valid state laws and valid and enforceable state decisions under the test customarily applied in equity cases involving injunctive issues, without the requisite additional showing of the existence of exceptional circumstances which is mandated by the Huffman test in cases where Huffman is pleaded as a valid defense. The

memoradum decision, dated May 4, 1994, authorizes and condones:

> (a) use of a Federal Civil Rights Action under 42 U.S.C. Section 1983, by a citizen of the state of Nevada, to restrain the State of Nevada from enforcing valid state laws and valid state decisions; and
>
> (b) constitutes an invalid federal intrusion into the operations of the judiciary system of the state of Nevada, with respect to judicial review of state orders.

Under the 10th Amendment, Nevada (and its agent, the City of Henderson) is entitled to the free exercise of its Police Powers, and Nevada is entitled to control the development of the rules and procedures regarding the issuance and

judicial review of state orders issued pursuant to its Police Power.

Under the 11th Amendment, the judicial power of the United States does not extend to any action commenced and prosecuted against Nevada by its own citizen, over the objection of Nevada. To restrain the City of Henderson in the enforcement of its laws (regarding the issuance of revenue-based municipal business licenses) requires the restraint of valid state laws and the entire operation of the judicial system of the state of Nevada, with respect to judicial review of such orders, and the determination of the finality and enforceability of such orders.

The federal judiciary enjoined the operation of valid state laws <u>without cause</u>. The reasoning expressed in the memorandum decision of this Court, dated May 4, 1994, and the court's judgment with respect to the propriety of the use

of federal injunctive power, violates the 10th and 11th Amendments of the U.S. Constitution, and flies in the face of the Huffman test (Rule of Law) mandated by the U.S. Supreme Court (which precludes the issuance of such an injunction where the proponent fails to plead the additional facts which Huffman requires). This Court does not address that distinction in its opinions. See Aiona, discussed at page 9 infra.

SECOND: The U.S. District Court preliminary injunction, which was erroneously issued on June 4, 1990, and continued by this Court on December 22, 1992, and has barred the City from taking action for approximately four years (in violation of the 10th and 11th Amendments), is presently in force .

THIRD: At the hearing in the U.S. District Court, the
City opposed the issuance of an injunction on the grounds that the U.S.

District court could not grant equitable relief in the nature of an injunction because of the Equity "clean hands" maxim which bars the courtroom to those who have acted fraudulently.

At the trial of the Civil Rights Lawsuit on November 27, 1992 (two and one-half years after the granting of injunctive relief), the U.S. District Court again refused to apply the Huffman Test (Rule of Law) as mandated by the U.S. Supreme Court and instead, proceeded to reexamine the facts which were found in the Henderson City Council's quasi-judicial hearing under Nevada law, finding and declaring that the City Council's "fraud" finding was proper (i.e. was not ultra vires), and thereby establishing as a proven fact that, in entertaining jurisdiction over the Civil Rights Action, the Court's determination was in violation of the Huffman test (Rule of Law) and the Tenth

and Eleventh Amendments.

Rather than affirming that the Huffman test (Rule of Law) applied to the federal complaint and prohibited the Court from exercising jurisdiction and issuing an injunction, the U.S. District Court lifted its preliminary injunction and decided the case on the merits, denying federal relief on the very grounds that the City had urged to prevent issuance of any federal injunction at the time preliminary relief was issued (i.e. that the Equity maxim precluded the Court from assuming jurisdiction). On December 22, 1992, the Ninth Circuit stayed the U.S. District Court's Order and wrongfully continued that injunction in further violation of the Huffman test (Rule of Law) and the Tenth and Eleventh Amendments.

The Court of Appeal's May 4, 1994 memorandum decision flies in the face of

the test (Rule of Law) which was declared and mandated by the U.S. Supreme Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (1978), for the purpose of preventing a potential Tenth and Eleventh Amendment conflict similar to that which had occurred in Huffman. By reexamining the facts which had been before the Nevada quasi-judicial body to permit the Court to arrive at its own de novo finding of "fraud" (an inherent violation of the Huffman Rule which contravenes the Tenth and Eleventh Amendment), and denying federal jurisdiction on that ground, the U.S. District Court and this Court of Appeal has repeated the very error that the Huffman Rule of Law was designed to prevent.

FOURTH: The opinion of the Ninth Circuit panel in Aiona v. Judiciary of the State of Hawaii, 17 F.3d 1244 (Mar. 3, 1994) (Poole, Wiggins, T.G. Nelson)

specifically held the rule of law to be that which the trial court and this Court of Appeal has refused to acknowledge; that is, that the Plaintiff has an additional burden of proof beyond that which is applied in Equity cases seeking an injunction, and the U.S. District Court has no discretion to grant an injunction as the U.S. District Court erroneously did below, absent the requisite showing of "extraordinary circumstances." See 17 F.3d 1244, at 1248-1249:

> "Under the Younger abstention doctrine, a federal court in most circumstances may not interfere with pending state criminal or civil proceedings, including state administrative proceedings. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986); Ronwin v. Dunham, 818 F.2d 675, 677-78 (8th Cir. 1987) (administrative proceeding regarding suspension of driver's license for speeding). Abstention is appropriate in favor of state proceedings if (1) the state proceedings are ongoing, (2) the proceedings implicate important state interests, and (3) the state

proceedings provide the plaintiff an adequate opportunity to litigate federal constitutional questions. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982); accord Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986). If these three circumstances exist, then "a district court must dismiss the federal action ... [and] there is no discretion to grant injunctive relief. Fresh Int'l Corp., 805 F.2d at 1356 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1245, 47 L.Ed.2d 483 (1976)). [Our Emphasis.]

"If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. at 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph 'then federal intervention in state court proceedings is appropriate. Id. [Our Emphasis.]

"Here, state administrative proceedings and judicial proceedings were ongoing at the time the plaintiffs filed this section 1983 action[1], and the

---

[1] This is the same fact situation which is before the Court in the instant case.

> plaintiffs do not contest that the state has an important state interest in keeping drunk drivers off the road [footnote omitted]. Thus, the first two prongs of the Younger test are met.
>
> "In addition, the third prong of the abstention inquiry -- the adequacy of opportunity to raise constitutional issues -- is satisfied by the plaintiffs' ability to raise constitutional claims during judicial review of the administrative proceedings. Haw.Rev.Stat. Section 286-260 (court may review whether director exceeded constitutional or statutory authority); see Dayton Christian Schools, 477 U.S. at 629, 106 S.Ct. at 2724 (even if constitutional claims cannot be raised in an administrative proceeding, it is 'sufficient ... [that they] may be raised in state court judicial review of the administrative proceeding'); Partington v. Gedan, 880 F.2d 116, 124 (9th Cir. 1989) (same), vacated in part on other grounds, 497 U.S. 1020, 110 S.Ct. 3265, 111 L.Ed.2d 776 (1990) [footnote omitted]." [Our Emphasis.]

FIFTH: The City contends that its cross-appeal, under the law expressed above in Aiona, supra, is not moot, for the reasons expressed in the "Conclusion" to its response to Nevada Entertainment's Petition for Rehearing

of this Court's November 2, 1993 opinion (which held that Huffman applied but would not express the law to be as was further upheld and explicated in Aiona). In its Conclusion, the City argued at pages 7-9:

> "Conclusion"
>
> "Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.
>
> "The City of Henderson in this regard, however, makes these further contentions:
>
> "(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong probability that the assumption of federal jurisdiction would lead to the type of Tenth and Eleventh Amendment infringement of state

powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

"(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

"(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge

> from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, neverthless, recklessly continued such litigation by remaining silent and refusing to address the City's arguments on the jurisdictional aspects."

This Court's November 2, 1993 opinion with respect to the application of Huffman should be reinstated and amended to conform to Aiona, and remanded for determination of an award of a reasonable attorney fee in favor of the City of Henderson under 42 U.S. 1988, for assessment against the Bond which was filed by Nevada Entertainment.

SIXTH: In four years of appellate litigation, which included two pre-trial applications to the Ninth Circuit Court of Appeal on extraordinary petitions for a writ of mandate and two applications to the U.S. Supreme Court on (pre-trial) petitions for writs of certiorari, the City of Henderson has contended that certain panels of the Ninth Circuit are

ignoring the Huffman test (Rule of Law) which the U.S. Supreme Court has mandated. Representative of that split of opinion is the differing opinions of Circuit Judges Kennedy and Tang in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987). See City of Henderson's Opening and Answering brief, at page 10 reading:

> "There appears to be a split of opinion within the Ninth Circuit on this issue, as demonstrated by the Ninth Circuit's handling of the matter in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (CA 9, 1987) [Tang and Kennedy]. The concurring Opinion of then-Circuit Judge Kennedy clearly follows the approach of the Sixth Circuit, which holds that it is 'jurisdictional,' and that a dismissal is mandated."

The City of Henderson contends that this Court's November 2, 1993 opinion (which addressed the Huffman issues) should not have been withdrawn but should have been modified.

All that this panel need do to

bring its interpretation of Huffman, as set forth in its opinion dated November 2, 1993, into compliance with the rule of law expressed in the Aiona case, which the City contends is clearly the law under the U.S. Supreme Court mandate in Huffman, would be to add the following sentence appearing in the Aiona case at page 1248:

> "If these three circumstances exist, then a 'district court must dismiss the federal action ... and there is no discretion to grant injunctive relief.'"

SEVENTH: The City contends that, in the light of the present legal controversy over the meaning of the Huffman test (Rule of Law) which has existed for the past three years as noted above, this Court cannot, consistent with due process and equal protection of the law principles of the federal constitution, and the evolution of common law "precedent" which depends

upon the correct resolution of such disputes, issue an order which precludes the decisions of this Court from being cited and considered in the Ninth and other Circuits of the federal court or in State Courts, in relation to the subject of such raging controversies, and such order should be vacated.

EIGHTH: At oral argument, Chief Judge Browning inquired as to why the jurisdiction issue (re federal courts) was so important to the City's interests. A partial explanation follows:

The record clearly indicates that there was no reasonable basis for the U.S. District Court to grant the injunctions issued herein (i.e. the temporary restraining order and the preliminary injunction). Federal injunctive relief allowed Federal Plaintiffs to freely conduct their operations in defiance of State law

pending "adjudication on the merits,", without making the requisite factual showing of "extraordinary circumstances," as required by Younger-Huffman. The City has suffered irreparable harm by being restained for a period of four years from enforcing valid state laws and valid state decisions.

It is the improper exercise of federal injunctive power that has "empowered" the Federal Plaintiffs and shielded them from the consequences of their fraudulant conduct, and which has enabled them to conduct their business and reap substantial monetary benefits, in defiance of Nevada state law. The disposition of this case by this Court of Appeal is grossly unfair. By failing to address the improper exercise of federal injuctive relief and by refusing to apply the Huffman test, the Court's action will only serve to encourage the

multiplication of fraudulent conduct. This is because the Court, in effect, has rewarded and encouraged the filing of federal complaints under 42 U.S.C. Section 1983, accompanied by requests for injunctive relief pending "final adjudication on the merit," as a method of "buying time" for recalcitrant business operators.

Fresh International Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986), cited with approval in Aiona, supra, states that:

> "When a case falls within the proscription of Younger, a district court must dismiss the federal action. See Judice v. Vail, 430 U.S. 327, 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977). The Supreme court has stated expressly that '[w]here a case is properly within [the Younger] category of cases, there is no discretion to grant injunctive relief.' Colorado River Water Conservation District v. United STates, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1246 n. 22, 47 L.Ed.2d 483 (1976)."

In a quasi-judicial administrative proceeding, Federal Plaintiffs were

found to have been guilty of fraud, having made misleading statements and misrepresentations in connection with their application for a City business license. A deliberate misrepresentation to a governmental licensing agency can never be immaterial. The manner in which the federal courts have handled this case has caused irreparable harm to the City of Henderson, as was stated to the U.S. District Court by the City in oral argument opposing the issuance of a temporary restraining order [see Reporter's Transcript for April 27, 1990 (hearing on temporary restraining order), appearing at Appellees' Supplementary Excerpts of Record (hereinafter referred to as "SER"), at Exhibit 18, pages 13-14]:

> "The harm -- there is irreparable harm to the City because what it does, this type of case sends a message to the public that it's okay to make misrepresentations, that it's okay to lie on your application form if you don't agree

> with an ordinance of the City, and the, if the City should find out about it and seeks to revoke your license, then all you have to do is seek equitable relief to stay open. And that is contrary to the fundamental principle of he who comes into a court of equity must come with clean hands. And that is exactly the situation we have here."

See also SER 18, at page 15:

> "The real issue here is whether the City may revoke a license for fraud. And I just want to read a quote from a case, New York Football Giants, Inc., versus Los Angeles Chargers Football Club, Inc., 291 F.2d 471 at 474, a 1961 case. Quote, 'We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout.'

Immediately thereafter, at SER 18, page 16, the Federal Plaintiffs clearly indicated that they wanted to "reargue" to the Federal Court matters decided by the state quasi-judicial administrative decision:

> "....We do not concede that

> the application was false or fraudulent....
>
> "Once this case reaches the merits, we're going to have evidence before this Court, as we did present before the Henderson City Council, that the City Council and the City officials knew all along what this business was going to be like, that nobody was fooled, and that the application form itself was not deceptive of an official --"

It is clear from the record that the U.S. District Court had no discretion to grant injunctive relief. The U.S. District Court, in issuing its Temporary Restraining Order and Preliminary Injunction, required that Federal Plaintiffs post a bond in the amount of $10,000 and $20,000, respectively. The City of Henderson contends that it is entitled to forfeiture of the entire amount as part of the costs and damages the City has incurred during the four-year pendency of the federal injunctions which ultimately never should have issued. Nintendo of America, Inc. v. Lewis

Galoob Toys, Inc., 94 DJ DAR 2055.

Dated: May 17, 1994

Respectfully submitted,

_____

James J. Clancy

APPENDIX 8

Order of the United States Court of Appeals for the Ninth Circuit denying the City of Henderson's Petition for Rehearing, filed June 14, 1994.

BEST AVAILABLE COPY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,

Plaintiffs/Appellants/ Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,

Defendants/Appellees/ Cross-Appellants.

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUN 14, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

The City of Henderson's petition for rehearing is denied.

APPENDIX 9A

City of Henderson's Motion For Leave to File Second Petition for Rehearing filed June 17, 1994 based upon Kokkonen v. Guardian Life Ins., Co. of America decided May 16, 1994.

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APPENDIX 9B

Second Petition for Rehearing of City of Henderson lodged June 17, 1994, claiming a lack of subject matter jurisdiction in the Ninth Circuit to withdraw the Ninth Circuit November 2, 1993 Opinion after it was published, because of the November 2nd undisturbed Finding of Fact and Conclusion of Law that Huffman Abstention applied, drawing an analogy to the U.S. Supreme Court decision in Kokkonen on May 16, 1994.

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. No.) CV-S-90-264-) LDG-LRL])))))))))))

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING UNDER FEDERAL RULES OF APPELLATE PROCEDURE, RULE 40(a) [BASED UPON NEWLY DECIDED AUTHORITIES]

Defendants/Appellees/Cross-Appellants City of Henderson, a Nevada Municipal corporation, and James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") hereby respectfully move this Honorable Court for an order granting leave to file a Second Petition for Rehearing pursuant to Federal

Rules of Appellate Procedure, Rule 40(a), based upon a new authority which was published two days before the filing of the Original Petition [Kokkonen v. Guardian Life Ins. Co. of America, decided by the United States Supreme Court on May 16, 1994, CCH S.Ct. Bull. p. B1724-1732].

Said motion is based upon the Declaration of James J. Clancy, and the Points and Authorities hereinafter set forth.

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

DECLARATION OF JAMES J. CLANCY

I, JAMES J. CLANCY, declare as follows:

1. I am an attorney at law, duly admitted to practice before the United States Court of Appeals for the Ninth

Circuit, and the United States Supreme Court.

2. On November 2, 1993, this court reversed the United States District Court's Judgment and filed an Opinion in which it declared that the United States District Court should have abstained under principles of law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and certified the same for publication under Circuit Rule 36-2, which was reported in the advance sheets as Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., 8 F.3d 1348 (CA9, November 2, 1993).

3. On April 7, 1994, this Court filed an order in which it granted the petition for rehearing of Nevada Entertainment Industries, Inc. and withdrew its Opinion filed on November 2, 1993. On May 4, 1994, this Court filed a Memorandum decision which affirmed the United States District Court's Judgment and dismissed, as moot, the City of

Henderson's Cross-Appeal which argued that the action should have been dismissed under Huffman, supra.

4. On May 18, 1994, the City of Henderson filed a Petition for Rehearing, and on May 17, 1994 this Court filed an order enlarging the time for Nevada Entertainment Industries, Inc. et al. to file a Petition for Rehearing to June 21, 1994, which, as of this date, has not yet been filed.

5. On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit, Docket No. 93-1969 in the United States Supreme Court, requesting, among other things, an Order that the May 4, 1994 Judgment of this Court be reversed for lack of "subject matter jurisdiction." Said grounds (subject matter jurisdiction) were not specifically named in relation to the May 4, 1994 judgment, in the May 18th Petition for Rehearing.

6. On June 14, 1992, the City of Henderson filed an amended Application in No. 93-1969 in the United States Supreme Court requesting that the Court shorten time and act upon the City of Henderson's Petition for Writ of Mandamus (based upon "lack of subject matter jurisdiction") before the end of the October Term, 1993.

7. On May 16, 1994, two days prior to the filing of moving parties' First Petition for Rehearing, the United States Supreme court filed its opinion in Kokkonen v. Guardian Life Ins. Co. of America, supra. See copy attached to this Motion as Exhibit A. In Kokkonen, supra, a unanimous United States Supreme Court issued an unanimous opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis

for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992) (slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. V. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

8. In this Second Petition for Rehearing, the City of Henderson respectfully invites this Court's attention to the rationale set forth in the Kokkonen case as a further reason for granting a rehearing, for all of the reasons expressed in the arguments made by the City in its Petition for Writ of Mandamus in Docket No. 93-1969, referred to in paragraph 5, above, a copy of which was served upon the members of this Court on or about June 3, 1994.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 1994, at Sun Valley, California.

James J. Clancy
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES

I

Federal Rules of Appellate Procedure, Rule 40(a), provides in relevant part, as follows:

> "(a) Time for filing; content; answer; action by court if granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present...." (Our Emphasis.)

II

As a result of this Court's November 2, 1993 Opinion and Judgment, "subject

matter jurisdiction" now has "two heads" in this appeal.

The United States Supreme Court's rationale and holdings in the Kokkonen case is relevant on two issues involving the legal concept "subject matter jurisdiction" as it applies in this case:

> (1) whether, in view of the City of Henderson's claim that Huffman v. Pursue, Ltd. was controlling, the federal district court had "subject matter jurisdiction" at the outset;
>
> (2) whether, in view of this Court's finding that Huffman v. Pursue, Ltd., was controlling precedent, this Court exhausted its subject matter jurisdiction when it published its November 2, 1993 Opinion and filed its November 2, 1993 judgment.

Absent some independent basis for federal jurisdiction, a federal court lacks the power [i.e. lacks "subject matter jurisdiction"] to either enforce or enjoin

a state judgment. In this case a judgment of license revocation was issued by a state quasi-judicial administrative body, which judgment was subject to judicial review within the state court system. Since "extraordinary circumstances" were absent, the federal court lacked "subject matter jurisdiction" over this state decision, and could not lawfully conduct a review of the state proceedings, nor enjoin enforcement of the state judgment. The federal court should have abstained in this case under the Huffman doctrine.

Dated: June 15, 1994

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees and
Cross-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL]

APPEAL FROM THE U.S. DISTRICT COURT

FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

SECOND PETITION FOR REHEARING

JAMES J. CLANCY (State Bar. #26946)
CAROL A. CLANCY (State Bar #065453)
9055 La Tuna Canyon Road
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(818) 352-2069
Attorneys for Defendants/Appellees
and Cross-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL])))))))))))

SECOND PETITION FOR REHEARING

TO THE CLERK OF THE COURT:

The City of Henderson, et al. (hereinafter "City of Henderson") petitions the Court to vacate its order of April 7, 1994 and Memorandum of May 4, 1994, in order to reconsider the City's Cross-appeal and whether the issues presented therein are moot, in light of the recent unanimous decision of the

United States Supreme Court in Kokkonen v. Guardian Life Insurance Company of America, CCH S.Ct. Bull. p. B1724-1732, decided by the High Court on May 16, 1994, in which a unanimous United States Supreme Court issued an opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992) (slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction,

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

In a Petition for Rehearing, dated May 17, 1994, and filed on May 18, 1994, the City of Henderson (at page 1 thereof) asked for a rehearing:

> "in light of certain material facts and law overlooked by the Court, and an apparent conflict with another Decision of this Court; and to reexamine its order that said memorandum 'is not appropriate for publication and may not be cited.'"

By order filed November 17, 1994, this Court granted an extention of time for Nevada Entertainment Industries, Inc., et al. to file their Petition for Rehearing to June 21, 1994.

The City of Henderson's Second Petition for Rehearing is predicated upon a different ground from that stated in the first Petition for Rehearing, i.e. the impact of the United States Supreme Court's ruling on May 16, 1994, in Kokkonen v. Guardian Life Ins. Co. of America, supra, in light of the City's additional claim that this Court's action

in withdrawing the November 2, 1993 Opinion and Judgment was arbitrary, capricious and ultra vires, in that the Court, having ruled in the November 2, 1993 Opinion that Huffman v. Pursue, Ltd. applied, had, in publishing that Opinion exhausted its "subject matter jurisdiction" and its subsequent action on April 7, 1994 and May 4, 1994 were ultra vires.

In four years of litigation, the City of Henderson has claimed that, upon the record below and absent the pleading and proof of "extraordinary circumstances," Nevada Entertainment Industries, Inc. et al failed to state a federal cause of action for a civil injunction against the City under 42 U.S.C. Section 1983, and therefore, the United States District Court lacked "subject matter jurisdiction" under the United States Supreme Court's decision in Huffman v. Pursue, Ltd., 420 U.S. 592, and the Tenth and Eleventh Amendments to the federal Constitution.

In its Petition for Writ of Mandamus, filed on June 6, 1994, as In Re City of Henderson et al. v. Nevada Entertainment Industries, Inc. et al., in No. 93-1969, the City contends at pages 4-5: (1) that the United States District Court and the United States Court of Appeals (having found that the City had acted lawfully, and not ultra vires) [see Ex parte Young, 209 U.S. 123 (1908)], had conclusively established that that Court lacked "subject matter jurisdiction" and it must dismiss under Huffman, supra, and additionally at pages 48-49, (2) this Court having certified its Opinion that Huffman controlled and entered a Judgment and Opinion to that effect, had exhausted its jurisdiction and that its April 7, 1994 and May 4, 1994 actions were ultra vires (based upon lack of "subject matter jurisdiction"). The reasons for this Court's granting a rehearing on these ground are as follows (see, also, Amended Application in Case No. 93-1969, copy of

which has been filed with this Court, at pages 3-12):

REASONS FOR GRANTING A REHEARING

Because favorable weather and an equally favorable economy have contributed to the growth of the geographical area of Henderson, Nevada (located in close proximity to Las Vegas) as an attractive place for family living and new businesses, an influx of new residents is anticipated. The City of Henderson must respond to the challenges presented by this increased expansion and urbanization.

Over half a century ago the United States Supreme Court broadly sustained the power of local municipalities to utilize land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the seminal case dealing with

the regulation of adult uses through municipal zoning, Mr. Justice Powell, in his concurring opinion, referring to Euclid, remarked

> "The Court there noted the very practical consideration underlying the necessity for the power: '[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387. The [Euclid] Court also laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in 'some aspect of the police power, asserted for the public welfare': the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgement is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.' Id., at 387, 388.
>
> "In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid...." 427 U.S. at 73-74.

In order that the proper Constitutional balance might be maintained

in the exercise of the city's interest in planning and regulating the use of property for commercial purposes, the City of Henderson has undertaken steps to implement municipal code revisions which cover a variety of methods for regulating a wide-range of modern commercial uses, including adult businesses of the type authorized in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986).

Exercise of the municipal right to utilize innovative land-use regulation in the control of modern urban development has been recognized as implicating First Amendment concerns only incidentally and to a limited extent, in Young v. American Mini Theatres, Inc., supra [see concurring opinion of Mr. Justice Powell, at 475 U.S. 73-74]. However, legislation of this type is certain to meet with courtroom opposition by those whose businesses will be affected. In the City's view, these

"courtroom" battles should be waged within the State Court system, which accords a full and fair opportunity to present all Constitutional claims before the only tribunal which can interpret and construe the nuances of new municipal legislation (i.e. the state court system). See Watson v. Buck, 313 U.S. 389, 402 (1941); U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971); and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. It is clear in an appeal from a quasi-judicial administrative hearing, the Nevada judicial system is empowered to examine all legal issues (including federal constitutional claims). See Boulder City, Nevada, et al. v. Cinnamon Hills Associates et al., No. 23951, 110 Nev., Advance Opinion 27 (March 30, 1994), slip opinion at p. 7 [in appeal arising out of dispute over denial by administrative body of building permit, Nevada courts "may examine constitutional issues on appeal that substantially impact

the rights of the litigants," citing McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983), and "a litigant may state a viable [42 U.S.C.] Section 1983 claim if denied a building permit in violation of protected constitutional rights," citing Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988); Scott v. Greenville County, 716 F.2d 1409, 1421 (4th Cir. 1983); and "absent any constitutional infringement, a section 1983 claim fails"].

The City of Henderson, for a number of reasons expressed in its Petition in No. 93-1969, urges that litigation regarding the interpretation of municipal legislation should not be initially conducted in Federal Court, but that an authoritative construction of all such new ordinances should be given by the Nevada State Court, except in those cases where the "exceptional circumstances" of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) may make such impossible. Only where there

are "extraordinary circumstances" is it appropriate for a federal court to intrude in the state court adjudicatory process (as, for example, where a piece of municipal legislation is "flagrantly and patently violative of express constitutional prohibitions...," [see New Orleans Publ. Serv. v. New Orleans, 491 U.S. 350 (1989), at 366, referring to Younger v. Harris, 401 U.S. at 53-54, quoting Watson v. Buck, 313 U.S. 387, 402 (1941)]. If this is to become an actuality, the final judgment in the City of Henderson et al. v. Nevada Entertainment Industries, Inc., et al. case must reflect that principle. See, in this regard, the opinion in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248-1249 (CA 9, 1994):

> "If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional

> prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate. Id. "

For the above reason, the City of Henderson has requested that a mandamus order be directed to the Ninth Circuit requiring this Court to reinstate its November 2, 1994 ruling and to amend its interpretation to bring it into agreement with the concurring opinion expressed by Associate Justice Kennedy, then sitting as a Circuit Judge, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, at 1081 (CA 9, 1989), and the opinion of Circuit Judge Poole in Aiona, 17 F.3d 1244, at 1248-1250.

This Court's unanimous Opinion, in 8 F.3d 1348 reviewed the facts of record before the Court of Appeals and held at page 1350 et seq. that the law expressed in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and New Orleans Public Service, Inc. (NOPSI) v. City Council of New

Orleans, 491 U.S. 350 (1989) set forth the principles which controlled this Court's disposition of the City's cross-appeal; namely, that the Huffman abstention doctrines [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)] required that the 42 U.S.C. Section 1983 complaint of Nevada Entertainment Industries, Inc. et al. must be dismissed under the United States Supreme Court's decision in Huffman v. Pursue, Ltd., supra.

Petitioner contends that this Court's subsequent Order of April 7, 1994, and its Memorandum of May 4, 1994, are arbitrary and capricious and ultra vires, in that, having ruled that Huffman abstention applied, and required that the case be dismissed on Huffman grounds, this Court must do so on those grounds: i.e. for lack of subject matter jurisdiction, which made any further proceedings impossible because the Court itself had no jurisdiction to act on the matter, in relation to the City of Henderson et al. acting for the State

of Nevada who would no longer be properly before the Court. Where the High Court's mandate in Huffman, supra, is clear and has not been followed by this Court, a writ of mandamus is proper to require that such duty must be performed. See Connor v. Coleman, supra, 425 U.S. 675, at 678. Kokkonen v. Guardian Life Ins. Co. of America, supra. See also Huffman v. Pursue, Ltd., supra, Brennan's dissent at footnote 1. It is interesting to note that the Counsel in Kokkonen has informed the City of Henderson's counsel that seven states filed an amicus brief in support of their position on subject matter jurisdiction.

The following two substantial Federal Questions have already been presented to the United States Supreme Court as Questions I and II in Petition No 93-1969 for Writ of Mandamus:

Question I:

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592

(1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the U.S. District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the 11th Amendment and this Court's abstention ruling in Huffman, supra.

Question II:

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law expressed by Chief Justice Rehnquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jurisdiction; and

(4) in which the Court has made

findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8 F.3d 1348 (CA 9, 1993); may thereafter be withdrawn by the Court without providing a good and lawful reason?

This Court has granted Nevada Entertainment Industries, Inc. et al. an extension of time in which to file its Petition for Rehearing up to and including June 21, 1994. In a separate Application to the U.S. Supreme Court with respect to Docket No. 93-1969, the City of Henderson has requested an Order shortening time which would require this Court to act on or before that date (June 21, 1994).

Question 1 and Question 2 of the Petition for Writ of Mandamus, raise the important question as to the real meaning of the term "lack of subject matter jurisdiction" as that term has "meaning" in relation to the Huffman abstention doctrine. It presents a substantial federal constitutional question, not

heretofore considered, which is "ripe" and should be resolved immediately, because:

(1) it is the center of a major on-going controversy between United States District Court and United States Circuit Court Judges in the Ninth Circuit, and elsewhere. See Huffman v. Pursue, Ltd., supra (Brennan dissenting, at footnote 1);

(2) is the central issue in both the City of Henderson's cross-appeal now before this Court on the City's Petition for a Rehearing and the City of Henderson's present Petition for Writ of Mandamus, culminating four years of continuing litigation on this issue; and

(3) the record below is simple and short, the issues before this Court are squarely drawn by the action which was taken by this Court on April 7, 1994 and May 4, 1994, and are "ripe" for review by the United States Supreme Court pursuant to the Petition for Writ of Mandamus in No. 93-1969.

Questions 1 presents a substantial

federal question as to a controversy before the federal judges at both the trial court and appellate court levels in relation to the real meaning of the Huffman doctrine. That conflict was drawn in focus by the concurring opinion of Associate Justice Kennedy then sitting as a Circuit Judge in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion). Petitioner City of Henderson et al. in its Petition for Writ of Mandamus on that Question contends that Justice Kennedy's interpretation is correct and is the underlying issue in its Petition for Writ of Mandamus, and is the issue which was raised by Justice Brennan in his dissent in 420 U.S. 612, at footnote 1; namely, that in those cases in which the Huffman abstention doctrine applies, and dismissal is mandated, the dismissal is and can be based on one ground only because of its historical basis -- lack of subject matter jurisdiction, meaning the

federal court has determined that it has no jurisdiction over the action before it (because jurisdiction over the matter resides in the State Court under the Eleventh Amendment to the United States Supreme Constitution), and the "person" of the City of Henderson et al. acting for the State of Nevada, brought before the federal court, is no longer properly before the federal court. Further, it is clear that the "subject matter jurisdiction" issue has never been waived by the City of Henderson in its four years of litigation and should be answered by this Court on the Petition for Rehearing herein. That issue is now squarely before this Court on the City of Henderson et al.'s Second Petition for Rehearing.

Review by this Court of the matters raised by this Second Petition for Rehearing is urgently requested by the City of Henderson, et al., acting for the State of Nevada, because the Federal Court Injunction [enjoining the Petitioners from

the performance of lawful duties imposed by State law] -- a clear Eleventh Amendment violation -- has been in existence for four years and currently remains in force pending disposition of this case.

Counsel for Petitioners has contacted Counsel of Record for Real Parties in Interest, who has indicated that he does not oppose Petitioners' request for an ex parte order shortening time in the United States Supreme Court, and has stated he will file an express waiver of the right to file a response in the United States Supreme Court under Rule 20.5, so as to permit the Petition for Writ of Mandamus to be distributed to the members of the United States Supreme Court for their consideration at this time. Petitioner City of Henderson respectfully submits that a similar waiver by this Court pursuant to Rule 20.5 would greatly facilitate an early resolution of the central issues in the appeal and

cross-appeal herein.

Dated: June 14, 1994

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

APPENDIX 10

Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing of Nevada Entertainment, Inc. and both the City of Henderson's Motion for Leave to file a second Petition for Rehearing and its Motion for Order Staying the Mandate, filed July 11, 1994.

BEST AVAILABLE COPY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

Nevada Entertainment's Petition for Rehearing is DENIED. The City of Henderson's Motion for Leave to File a Second Petition for Rehearing is DENIED. The City of Henderson's Motion for Order Staying the Mandate is DENIED.

APPENDIX 11

Order of the United States Court of Appeals for the Ninth Circuit granting Nevada Entertainment's Motion to Stay the Mandate, filed July 25, 1994.

BEST AVAILABLE COPY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 25, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING, Circuit Judge.

Nevada Entertainment's motion to stay the mandate pursuant to Rule 41(b) is granted.

APPENDIX 12

Order of the United States Court of Appeals for the Ninth Circuit filed August 24, 1994 granting the Parties Joint Motion for Order Extending the Stay of the Mandate until the final disposition of the Parties' Petitions for Writs of Certiorari, which are to be filed on or before, Tuesday, October 11, 1994.

BEST AVAILABLE COPY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

AUG 24, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING, Circuit Judge.

The parties' joint Motion For Order Extending Stay Of Mandate is GRANTED. The mandate shall issue October 12, 1994. If

during the period of the stay, the clerk of this court receives notice that Nevada Entertainment has filed a petition for certiorari with the Supreme Court, the stay shall continue until final disposition by the Supreme Court. See FRAP 41(b).

APPENDIX 13

Order of the United States Court of Appeals for the Ninth Circuit informing the Parties that the Panel has voted to reject the Suggestion for Rehearing En Banc and that no Judge of the En Banc Court has requested a vote on the Suggestion for Rehearing En Banc, filed on May 11, 1994.

BEST AVAILABLE COPY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

MAY 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

The panel has voted to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is rejected.

APPENDIX 14

Supplemental Brief to Petition for a Writ of Mandamus (or Certiorari Under Rule 11) in Case No. 93-1969. [Reference: Explains the relevance and great importance of the recent Ninth Circuit's Opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (April 8, 1994) (CA 9) which contained a proper analysis of the "lack of subject matter jurisdiction" issue in relation to the Younger-Huffman Abstention Doctrine.]

BEST AVAILABLE COPY

No. 93-1969

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Petitioners

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
Real-Parties In Interest

ON PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

INTRODUCTION

Pursuant to Rule 15.7 of the United States Supreme Court Rules, Petitioners City of Henderson, a Nevada Municipal Corporation and James Goff, Chief of Police of the City of Henderson

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OCTOBER TERM, 1993

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SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

INTRODUCTION

Pursuant to Rule 15.7 of the United States Supreme Court Rules, Petitioners City of Henderson, a Nevada Municipal Corporation and James Goff, Chief of Police of the City of Henderson

(hereinafter "City of Henderson"), file this Supplemental Brief to their Petition for a Writ of Mandamus under Rule 20 (or Certiorari under Rule 11). This Supplemental Brief addresses itself to the following intervening matters and new cases not available at the time of the filing of said Petition on June 6, 1994.

STATEMENT OF FACTS SUBSEQUENT TO DATE OF FILING OF PETITION FOR WRIT OF MANDAMUS UNDER RULE 20 AND PETITION FOR WRIT OF CERTIORARI UNDER RULE 11.

1. On June 6, 1994, a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit was filed in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969.

2. On June 2, 1994 an application for: (1) an ex parte order to show cause

and (2) an ex parte order advancing the date set for the filing of briefs in opposition to the Petition for Writ of Mandamus or Certiorari under Rule 11 was transmitted by Express Mail to the U.S. Supreme Court but became separated from the Petition for Writ of Mandamus in the Clerk's Office and was returned to Petitioner, for lack of a supporting record on June 8, 1994. See copy at Appendix 1 to this Supplemental Brief.

3. On or about June 13, 1994, an amended application for: (1) an ex parte order to show cause and (2) an ex parte order advancing the date set for the filing of briefs in opposition to the Petition for Writ of Mandamus was transmitted by Express Mail to the Clerk of the U.S. Supreme Court. See copy at Appendix 2 to this Supplemental Brief. On June 14, 1994, in a phone conversation in relation to this pleading, the Clerk's Office informed the Counsel of Record that

matters of this nature should go to the entire Court under Rule 21.

4. On June 14, 1994 the Court of Appeals for the 9th Circuit filed an order denying the City of Henderson's Petition for Rehearing filed on May 18, 1994. See copy at Appendix 3 to this Supplemental Brief.

5. On June 15, 1994, the Amended Application for an ex parte order shortening time, addressed to Associate Justice Sandra Day O'Connor, was presented to Justice O'Connor who, on June 15, 1994, endorsed thereon the following: "Denied Sandra Day O'Connor 6/15/94." See copy at Appendix 4 to the Supplemental Brief.

6. On June 17 1994, the City of Henderson filed a Motion for Leave to File Second Petition for Rehearing, and a Second Petition for Rehearing in the Court of Appeals for the 9th Circuit under Federal Rules of Appellate Procedure, Rule 40(a) (based upon newly decided authorities: Kokkonen v. Guardian Life

Ins. Co. of America, 54 CCH S.CT. Bull. p.B 1724, decided by the U.S. Supreme Court on May 16, 1994. See copy at Appendix 5 to this Supplemental Brief.

7. On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

8. On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to this Supplemental Brief.

9. On or about June 21, 1994, the City of Henderson filed a Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus in the U.S. Supreme Court, as per the Clerk's instructions on June 14, (supra). See copy at Appendix 7 to this Supplemental Brief.

10. On June 25, 1994, the City of Henderson sent a transmittal letter to the Clerk of the Court together with an

application to be submitted to Associate Justice Anthony M. Kennedy, after denial of the same by Associate Justice Sandra Day O'Connor on June 15, 1994, and an additional Memorandum of Law for Justice Kennedy. See copy of the transmittal letter and Application to Associate Justice Kennedy and Memorandum of Law at Appendix 8 to this Supplemental Brief.

11. On July 11, 1994, the Court of Appeals for the 9th Circuit filed an order denying Nevada Entertainment Industries' Petition for Rehearing, and the City of Henderson's (1) Motion for Leave to File a Second Petition for Rehearing, and (2) Motion for Order Staying the Mandate. See copy at Appendix 9 to this Supplemental Brief.

12. On July 25, 1994, the Court of Appeals for the 9th Circuit filed an Order granting Nevada Entertainment Industries' Motion to Stay the Mandate pursuant to Rule 41(b). See copy at Appendix 10 to this Supplemental Brief.

13. On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit. See copy at Appendix 11 to this Supplemental Brief.

14. On August 24, 1994, the Court of Appeals for the 9th Circuit filed an order extending the Stay of Mandate to October 12, 1994. See copy at Appendix 12 to this Supplemental Brief.

STATEMENT OF THE CASE

On November 2, 1993, the Ninth Circuit Court of Appeals [Browning and Canby, Circuit Judges, Kelleher, Senior District Judge] filed its opinion in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, 8 F.3d 1348 (argued and submitted May 10, 1993 and decided November 2, 1993) in which it awarded judgment to the City on its

cross-appeal. The City of Henderson's cross-appeal had argued: (1) that the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) controlled the disposition of this appeal; and (2) that the Younger-Huffman abstention doctrine was predicated upon the 200 year old Eleventh Amendment and Anti-Injunction Statute, which required a dismissal for lack of "subject matter jurisdiction" and vacation of the District Court's Injunction of 4-years duration which had wrongfully prevented the City Council's quasi-judicial order of license revocation from being implemented.

However, on April 7, 1994, the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion upholding Huffman-Younger abstention, and on May 4, 1994, filed a memorandum decision holding the Younger abstention issue to be moot!

In this Petition for Writ of Mandamus, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a usurpation of the judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger Abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

I

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION.

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v.

Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of mandamus, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in

Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

The City of Henderson claims that the analysis in Wiener v. Counties of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet

been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away

with the confusion which is presently generated in the race to the Courtroom.

II

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the neglect of the County Counsel to focus upon the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387 (1941). As a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same

> legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective). Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al.

v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court,

including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix 7 page 7-7 herein and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in

substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications, involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to

set up a Constitutional "collision course."

III

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to this Petition for Writ of Mandamus is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman challenge. See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

CONCLUSION

Dubinka clearly establishes that the Ninth Circuit's analysis and orders in In Re City of Henderson v. Nevada Entertainment Industries Inc., (supra) on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Mandamus should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Mandamus.

Dated: September 16, 1994

Respectfully submitted,

James J. Cleary

Counsel of Record

APPENDIX 15

Henderson Municipal Code, Sections 4.04.150(a), (3), and (4); Sections 4.04.150 (b) (2), (3), and (5); and Section 4.06 (entire Section).

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4.04.150 DENIAL, NONRENEWAL, SUSPENSION, LIMITATION AND REVOCATION OF LICENSES:

It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this Title.

(a) Any license or permit application made pursuant to the provisions of this Title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information re-

quired by this Title.

(2) . . . .

(3) False or fraudulent statements in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) . . . .

(6) . . . .

(7) . . . .

(8) . . . .

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be

limited to, the following:

(1) . . . .

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) . . . .

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) . . . .

(7) . . . .

(c) All business licenses issued under

this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable.

CHAPTER 4.06: POLICY AND PROCEDURE (SHOW CAUSE, LICENSE SUSPENSION, LIMITATION, REVOCATION)

4.06.010 DEFINITIONS:

As used in this chapter, the words and terms shall have the meaning ascribed to them pursuant to Title 4, unless a different meaning clearly appears in the context.

4.06.020 INVESTIGATION AND REPORTING OF VIOLATIONS:

The Director is responsible for the enforcement of business license regulations and ordinances and the investigations thereof. Those violations which the Director deems necessary for additional diciplinary action, in addition to the action taken by the Division, shall be reported to the City Council for appropriate action.

4.06.030 LICENSING DIVISION TO COOPERATE WITH OTHER REGULATORY AGENCIES:

(a) The Business License Division shall cooperate with other public agencies concerned with the regulation and control of business licenses, and to that end may exchange with such agencies any and all types of confidential information. When dealing with any gaming matter, the Division may immediately inform the State gaming agencies of any investigation, hearing or other actions that the Division, or its members or agents may take.

(b) The Division may enter into an agreement with the State gaming agencies such that duplication of effort shall be kept to a minimum; provided, however, that if the apparent violation is of such a character that action should be

taken and if the State gaming agencies fail, refuse or decline to assume control of the investigation and hearing, then the License Agent shall promptly investigate.

(c) The Division may enter into an agreement(s) with liquor and gaming boards in the incorporated and unincorporated cities and towns of Clark County so that overall regulation and control may be more effectively maintained.

4.06.040 COMPLAINT AGAINST LICENSE DETERMINATION BY CITY ATTORNEY:

In addition to any action taken by the Division, upon the report by the License Agent to the Director of a violation charging a licensee with the commission of any act which may be cause for additional disciplinary action, the City Attorney, or his deputy, shall determine the legal sufficiency of the

evidence, and, if necessary, may request the License Agent and/or Chief of Police to make further investigation of the alleged violation.

4.06.050 COMPLAINT SERVICE:

(a) Upon a finding by the City Attorney that there is sufficient evidence of a violation of the regulations or ordinances, or of a threat or hazard to the public health, safety, morals or welfare, he shall draft a written complaint which shall set forth in ordinary and concise language the violation(s) with which the licensee or affected person (respondent) is charged. The complaint shall specify the statute, regulation or ordinance which the respondent is alleged to have violated, or the hazard or threat to the public health,

safety, morals, welfare or good order and shall be signed by the Director.

(b) Upon the issuance of the complaint by the City Attorney, the City Council shall forthwith review it and determine by vote of the majority of the members present whether to impose any additional suspension, limitation, revocation or disciplinary action.

(c) The complaint shall direct the respondent, within ten days after service thereof upon him, to appear by filing with the City Clerk, his verified answer to the complaint. The answer shall state whether or not the respondent requests a hearing, and shall admit or deny the facts alleged in the complaint and raise all legal and factual issues the respondent desires the

City Council to consider. The complaint shall notify the respondent that failure to file an answer shall result in disciplinary action against him by default. Service of the complaint shall be made upon the respondent as provided by the Nevada Rules of Civil Procedure for the service of process in civil actions. Proof of service shall be filed with the City Clerk.

(d) The City Attorney shall thereafter be in charge of presenting the evidence to the City Council.

(e) Upon the filing of an answer, the Mayor shall fix a time and place for hearing and give the respondent not less than fifteen days notice. The City Clerk shall give notice of such hearing date and time to the respondent and the City Attorney by depositing in the United States

Certified Mail a true copy of the notice enclosed in a sealed envelope with postage thereon fully paid, addressed to the respondent and his attorney, if any, and the City Attorney at the address shown on the pleadings.

4.06.060 FORM OF ANSWER-FILING DEADLINE:

(a) The answer of the complaint shall be signed and verified by the respondent, or his agent, served upon the City Attorney which prepared the complaint, and filed with the City Clerk within ten days after service upon respondent of the complaint. The complaint and answer shall form the pleadings for the hearing.

(b) The answer shall read substantially as follows:

"BEFORE THE CITY COUNCIL OF THE CITY OF HENDERSON, COUNTY OF CLARK, STATE OF NEVADA, In the Matter of:

Disciplinary Action)
Against A.B.,)
)
) ANSWER
)

To the Members of the City Council:

(1) the respondent does not request a hearing. (Note: If a hearing is desire, omit word "not".)

(2) The Respondent admits the following facts set forth in the complaint:

(3) The Respondent denies the following facts set forth in the complaint:

(4) The Respondent believes the following defenses and explanations should be considered by the City Council:

(5) The Respondent raises the

following legal defenses:

LICENSEE

(c) Upon the filing of an answer, the respondent shall be entitled to a hearing on the merits upon the issues denied by the answer.

4.06.070 FAILURE OF LICENSEE TO ANSWER CHARGES DEEMED ADMISSION OF GUILT:

(a) Failure of the respondent to answer within the time specified shall be deemed an admission by him of the commission of the act or acts charged in the complaint. Thereupon, the City Council shall forthwith impose disciplinary action, as the case may be, and shall give notice of sucn disciplinary action by mailing a true copy thereof by United States Certified Mail in a sealed envelope with

postage thereon fully prepaid, addresses to the respondent at his latest address of record.

(b) Failure to file an answer within the time designated shall further constitute a waiver of respondent's right to a hearing and to judicial review of any decision or order, but the City Council, in its discretion, may nevertheless order a hearing. All affirmative defenses must be specifically stated and unless objection is taken in the answer, all objections to the form of complaint are waived.

4.06.080 SUBPOENA AND COMPENSATION OF WITNESSES:

At any time prior to a hearing or during a hearing before the City Council, the Council shall issue subpoenas and subpoenas duces tecum at the

request of a party. All witnesses appearing pursuant to subpoena, other than parties, officers or employees of the State of Nevada or any political subdivision thereof, shall receive fees and mileage in the same amounts and under the same circumstances as provided by law for witnesses in civil actions in the District Court. Such fees shall be paid by the party at whose request the witness is subpoenaed and the City Council may, in its discretion, award as costs the amount of all expenses of witnesses to the prevailing party.

4.06.090 WITNESS-AFFIDAVIT-SERVICE:

The testimony of any material witness residing within or without the State of Nevada may be taken by deposition in the manner provided by the Nevada Rules of Civil Procedure. Affidavits may be received in evidence

at any hearing of the City Council in accordance with the following:

(a) The party wishing to use such affidavit shall, not less than four days prior to the day set for the hearing, serve upon the opposing party or counsel, either personally or by certified mail, a copy of the affidavit which he proposes to introduce in evidence together with a notice as provided in subsection (c) of this section.

(b) Unless the opposing party, within two days after such service, mails or delivers to the proponent a request to cross-examine affiant, his right to cross-examine such affiant is waived and the affidavit. if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to

cross-examine an affiant is not afforded after the request therefor is made in accordance herewith, the affidavit may be introduced in evidence, but shall be given only the same effect as other heresay evidence.

(c) The notice referred to in subsection (a) of this section shall be substantially in the following form:

"The accompanying affidavit of (name of affiant) will be introduced as evidence at the hearing set for the _____ day of _____, 19__.

(name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify the undersigned that you wish to cross-examine him. To be effective your request must be mailed or delivered to the undersigned on or before two days from the date of this notice and the enclosed affidavit are served upon you.

_____
(Party or Counsel)

_____
(Address)"

4.06.100 HEARING PROCEDURE- RECORD:

The following procedures shall apply at all hearings of the City Council:

(a) A quorum of the City Council shall be present at every hearing, and they shall exercise all powers relating to the conduct of the hearing and shall enforce all decisions with respect thereto.

(b) No member of the City Council who did not hear the evidence shall vote on the decision.

(c) The proceedings at the hearing shall be reported either stenographically and/or by audio recorder.

(d) Oral evidence shall be taken upon oath or affirmation administered by the City Clerk.

(e) Every party to a hearing shall have

the right:

(1) To call and examine witnesses; and

(2) To introduce exhibits relevant to the issues of the case, including the transcript of testimony at an investigative hearing conducted by, or on behalf, of the Division or City Council.

(3) To cross-examine opposing witnesses on matters relative to the issues of the case, even though the matter was not covered in a direct examination; and

(4) To impeach any witness regardless of which party called him to testify; and

(5) To offer rebuttal evidence.

(f) If the licensee does not testify in his own behalf, he may be called

and examined as if under cross-examination.

(g) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted and shall be sufficient to support a finding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action.

(h) The parties or their counsel may, by written stipulation, agree that certain specified evidence may be admitted even though such evidence might otherwise be subject to objection.

4.06.110 JUDICIAL NOTICE- EVIDENCE ADMISSIBLE:

(a) The City Council may take official notice of any generally accepted information or technical or scientific matter within the area of business licensee conduct and control and of any fact which may be judicially noticed by the courts of this state.

(b) The parties shall be informed of any information, matter or fact so noticed, and shall be given a reasonable opportunity, on request, to refute such information, matter or fact by evidence or by written or oral presentation of authorities, the manner of such refutation to be determined by the City Council.

4.06.120 AMENDMENT- FILING OF AMENDED PLEADINGS:

The City Council may, in its discretion, before submission of the case for decision, permit the filing of amended or supplemental pleadings and shall notify all parties thereof, and provide a reasonable opportunity for objections thereto.

4.06.130 MISCONDUCT DURING HEARING-REFERRAL TO DISTRICT COURT-CONTEMPT:

If any person in proceedings before the City Council disobeys or resists any lawful order or refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during the hearing or near the place thereof so as to obstruct the proceedings, the City Council may, in addition to remedies available to it, certify the facts to the District Court. The court shall thereupon issue an order

directing the person to appear before the court and show cause why he should not be punished for contempt. The court order and a copy of the statement of the City Council shall be served on the person cited to appear. Thereafter the court shall have jurisdiction of the matter; and the proceedings shall be had, the same penalties may be imposed, and the person charged may purge himself of the contempt as in the trial of a civil action before a District Court.

4.06.140 WRITTEN DECISION OF CITY COUNCIL- MAJORITY VOTE NECESSARY:

After the hearing of a contested matter, the City Council shall render a written decision on the merits which shall contain of fact, a determination of the issues presented and the disciplinary action to be imposed, if any, and shall thereafter make and enter

its written order in conformity with such decision. The affirmative votes of a majority of the City Council hearing the evidence shall be required to impose any disciplinary action. Copies of the decision and order shall be served on the parties personally or sent to them by certified mail. The decision shall become and remain effective upon such service, unless the City Council shall otherwise order.

4.06.150 AGGRIEVED PARTY- PETITION FOR REHEARING:

Within ten days after service of an order of the City Council, any party aggrieved may petition for a rehearing. Such petition shall not be granted except upon a showing that there is additional evidence which is material, necessary and reasonably calculated to change the decision of the City Council.

The petition shall be supported by an affidavit of the moving party or his counsel showing with particularity the materiality and necessity of the additional evidence and the reason why it was not introduced at the hearing. Upon rehearing, rebuttal evidence to the additional evidence shall be permitted. After rehearing, the City Council may modify its decision and order as the additional evidence may warrant.

4.06.160 JUDICIAL REVIEW:

Any person aggrieved by final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court.

(a) The judicial review shall be

instituted by filing a petition within twenty days after the effective date of the final decision or order. A petition for review may not be filed while a petition for rehearing is pending before the City Council. The petition for review shall set forth the order or decision appealed from, and shall set forth the specific rulings on questions of law which the petition contends constitutes error.

(b) Copies of the petition shall be served upon the City Council and all other parties of record, or their counsel of record, either personally or by certified mail.

(c) The filing of the petition shall not stay enforcement of the decision or order of the City Council, but the City Council itself may

grant a stay upon such terms and conditions as it deems proper, upon timely-filed motion.

(d) Upon written request of petitioner and upon payment of such reasonable costs and fees as the City Council may prescribe, the complete record on review, or such parts thereof as are designated by the petitioner, shall be prepared by the City Council or designated.

(e) The complete record on review shall include copies of all pleadings in the case, all notices and interim orders issued by the City Council in connection with the case, all stipulations, the decision and the order appealed from, a transcript of all testimony, evidence and proceedings at the hearing, the exhibits admitted or rejected, and any other papers in the case.

(f) A copy of any document may be used in lieu of an original. The record on review may be shortened by stipulation of all parties to the review proceedings. (Ord. 1114, March 7, 1989).

APPENDIX 16

United States District Court's Order, filed March 22, 1991 wherein the trial court held that Huffman Abstention was not applicable and denying the City of Henderson's first Motion to Dismiss upon Huffman abstention grounds.

BEST AVAILABLE COPY

UNITED STATE DISTRICT COURT
DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al.,	)	CV-S-90-264-LDG (LRL)
Plaintiffs,	)	[ENTERED MAR. 22, 1991 Clerk, U.S. Dist. Court, Dist. of Nevada By___Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

Plaintiffs have filed this action pursuant to 42 U.S.C. Section 1983 and allege a deprivation of their constitutional rights. Plaintiffs operate an adult theater and bookstore located in the City of Henderson. The City requires that such businesses locate within a "CH" zone. Furthermore, in order to operate the business, the City requires that plaintiffs obtain a business license and a use permit.

Plaintiffs applied for and received a business license based upon the following description: "Mass media books and video store, novelty shop, etc." Upon the opening of the business in February 1990, the City moved to revoke the license since it misrepresented the nature of plaintiffs' business. Plaintiffs contend that the application was not fraudulent. More importantly, plaintiffs contend that the license and use permit ordinances are invalid since they vest too much discretion in the hands of city officials in violation of plaintiffs' First and Fourteenth Amendment rights. Although the City Council voted to revoke the license, this court granted a temporary restraining order on April 27, 1990. After hearing oral arguments, this court granted a preliminary injunction on June 5, 1990. On October 1, 1990, the City filed a complaint for

declaratory judgment and injunctive relief in a Nevada state court. This matter is currently before the court on defendants' motion to dismiss (#24).

The City believes that the parties should adjudicate this dispute in state rather than federal court. However, this court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 350, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986). In general, abstention is inappropriate when extensive rather than a single adjudication would be required by a state court. Harris County

Commissioners Court v. Moore, 420 U.S. 77, 86 n.9 (1975) (citing Baggett, 377 U.S. at 378). The various licensing and regulatory ordinances involved in this litigation do not readily lend themselves to a single state court adjudication. The obligations imposed by the ordinances rather than the applicability of the ordinances are at issue.

The City seeks abstention based upon the principles contained in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman followed the abstention principles formulated in Younger v. Harris, 401 U.S. 37 (1971) which generally preclude a federal court from intervening in a pending state criminal prosecution. Id. at 41. Huffman required the Court to consider whether Younger "bars a federal court from intervening in a state civil proceeding such as this, when the proceeding is

based on a state statute believed by the district court to be unconstitutional." Huffman, 420 U.S. at 594. In Huffman, the owner of an adult theater challenged attempts by Ohio authorities to invoke the state public nuisance statute. A state court determined that the owner had displayed obscene movies and should be closed pursuant to the statute. Rather than file a direct appeal, the owner filed a federal action pursuant to 42 U.S.C. Section 1983 alleging that the use of the statute constituted a deprivation of constitutional rights under color of state law. Id. at 598. The Supreme Court held that Younger did bar federal action. The Court found that "[t]he state is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statues which prohibit the dissemination of obscene materials." Id. at 604.

However, the court stated that "we need make no general pronouncements upon the applicability of Younger to all civil litigation." Id. at 607. Although subsequent cases have applied Younger to other civil litigation, the Court has never adopted a rule that Younger applies to all civil litigation. See, e.g., Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).

Upon a review of the record, it is clear that the principles of Younger and Huffman should not apply to this litigation. Huffman can be distinguished in several important respects. Unlike Huffman, this litigation involves more than simply an application of state nuisance laws. In Huffman, a court had already determined

that the theater was showing obscene materials, but no such determination has been made in this case. Although obscenity is outside the scope of the First Amendment, some adult materials are afforded First Amendment protection. See Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir.), cert. denied, 110 S.Ct. 59 (1989). Perhaps most importantly, the federal complaint in Huffman was filed in the midst of on-going state litigation.

Before invoking the principles of Younger and Huffman, a state action must exist. As the Supreme Court stated,

> [w]hen no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Huffman, 420 U.S. at 885 (quoting

Steffel Thompson, 415 U.S. 452, 462 (1974). This requirement is not met simply by filing a federal action first. As the Supreme Court noted in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984), "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." See also Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350-51 (9th Cir. 1985). Thus, we must examine whether "proceedings of substance on the merits" took place in this court prior to the filing of the state action. In Hawaii Housing Authority, the Court stated that "[a] federal court action in which a preliminary injunction is granted has

proceeded well beyond the 'embryonic stage,' [Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975)], and considerations of economy, equity, and federalism counsel against Younger abstention at that point." 467 U.S. at 238. In the present case, this court issued the preliminary injunction some four months prior to the filing of the state court action. Thus, based on the above analysis, the court finds that abstention is not proper.

Additionally, a plaintiff need not exhaust available state remedies prior to bringing a federal action pursuant to Section 1983. The Supreme Court has recognized that "[w]hen federal claims are premised on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3) . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to

protect constitutional rights." Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). The Supreme Court established a limited exception in Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt, an inmate alleged that a state official's negligence deprived him of property without due process. The Court required the claimant to exhaust his state remedies which would fully compensate him for his monetary loss. Id. at 544. However, requiring state court exhaustion of all Section 1983 claims would be contrary to Congressional intent. See Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 508 (1982). Finally, the court does not believe that the Henderson Municipal Code compels a party to take their dispute to state court. Section 4.06.160 provides that "[a]ny person aggrieved by final decision or order of the City Council . . . may obtain a

judicial review . . . in the Eight Judicial District Court." This section is written with permissive rather than mandatory language. Thus,

IT IS HEREBY ORDERED, that defendants' motion to dismiss (#25) is denied.

IT IS FURTHER ORDERED, that defendants' application to show cause (#24) is denied.

DATE: 20, March 1990

LLOYD D. GEORGE
United States District
Judge

APPENDIX 17

Petition for Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 Statement of the Case at pages 21-65.

BEST AVAILABLE COPY

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7.

STATEMENT OF THE CASE

At the present time a raging conflict exists in the Ninth Circuit Court of Appeals (and other circuits) as to the exact meaning of the Huffman Abstention Doctrine. The conflict is accurately described as "raging" even though the controversy is not readily apparent on the surface from the individual opinions of the Justices themselves and can only be understood through a close examination and analysis of what has taken place in this case and

what is and has been taking place in the twenty years since Huffman v. Pursue, Ltd. was decided. For example, see the short concurring opinion in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989), in which Circuit Judge (now Associate Justice Kennedy) distinguished and accurately defined the Huffman abstention doctrine as "the doctrine of dismissal for lack of jurisdiction pursuant to Huffman v. Pursue, Ltd." -- a distinction and definition which Circuit Judge Tang and a number of the Ninth Circuit Judges will not accept nor do they wish to hear argument upon. The real meaning of Huffman is blurred.

As a result of this "silent treatment" by the Circuit Judges on the issue which is the very "heart" of the Huffman abstention doctrine and the treatment accorded this issue by highly qualified attorneys for the federal

plaintiffs who practice in this area and know the value of maintaining "silence" where challenges are made in support of Justice Kennedy's position (so as not to open "Pandora's Box"), the exact meaning is lost, and constitutional injustices occur in a great number of cases where the dispute clearly belongs in the state court, as here.

This is understandable, because it deals with a "lack of jurisdiction" within the federal system, and there are not many justices on the federal bench who are willing to make or join in an analysis which may limit the "jurisdiction" of the federal bench. As a result, Huffman abstention is not being applied in the manner intended by this Court's opinion in Huffman and the relevant cases.

The application herein is typical -- the Eleventh Amendment violation is patent, yet the Court of Appeals in four

years of litigation has refused to apply the doctrine with its full-meaning so that the confusion which exists as to the nature of the State of Nevada's sovereign rights can be put to rest.

At oral argument the Justices stated they were not interested in argument on the jurisdiction issue. When they issued their opinion in favor of the Huffman abstention doctrine, a decision which the facts absolutely required, and which could not be avoided, the Court crafted its opinion to avoid a discussion on the jurisdiction issue, a tactic which counsel for federal plaintiffs immediately took advantage of. In federal plaintiffs' petition for rehearing now made to the 36 en banc circuit judges on a suggestion for hearing by that body, the federal plaintiffs introduced a number of additional obfuscating issues which

would not be apposite had the Court stood firm and elaborated on the principles behind Justice Kennedy's doctrine of dismissal for lack of jurisdiction. The foundation for those new arguments was the federal plaintiffs' new argument that the "jurisdiction issue" had been "waived."

Subject matter jurisdiction is never waived -- a maxim which is the very heart of Huffman abstention. However, because the panel of federal circuit judges would not rule on this issue, the Court of Appeals' silence on this matter makes a correct analysis virtually impossible.

In its "Conclusion" at pages 16 et seq. of its Response to the Petition for Rehearing and Suggestion for Rehearing en Banc, filed January 18, 1993, the City made note of the fact that the weaknesses in the November 2, 1993 Opinion invited further obfuscation in

the Ninth Circuit in relation to Huffman abstention cases, and asked the Court to remand the case to the United States District Court for an exercise of that Court's discretion on attorney fees on the ground that the City was the prevailing party on the Huffman issue. See Appendix 4, at pages 16 et seq.:

"CONCLUSION"

"Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.

"The City of Henderson in this regard, however, makes these further contentions:

"(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong

probability that the assumption of federal jurisdiction would lead to the type of Tenth and Eleventh Amendment infringement of state powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

"(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

"(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of

> Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, nevertheless, recklessly continued such litigation by remaining silent and refusing to address the City's arguments on the jurisdictional aspects."

After conference on the plaintiffs expansive obfuscating arguments, which drew in issue its affect on decisions by other panels, the en banc court denied a hearing -- but only after the Ninth Circuit review panel withdrew its opinion!

The City of Henderson, Nevada, contends in its petition for mandamus and writ of certiorari that the Huffman Court never intended or contemplated that Huffman would be applied in such a manner on these facts.

The City's position is clear: once the Huffman doctrine is properly raised by state government as a defense to a

civil federal civil rights complaint requesting an injunction against a pending state quasi-judicial proceeding under 42 U.S.C. Section 1983 (which seeks to limit the "power" of the state judiciary to act in areas which traditionally were barred by the anti-injunction statute and the Tenth and Eleventh Amendments) the federal Court under Huffman is required to determine whether a conflict does and/or may result and if there is, to require the civil rights plaintiffs to amend their complaint for injunction and, by heightened pleadings, make an additional showing of "extraordinary circumstances" if they intend to state a federal cause of action for an injunction under the Civil Rights Act 42 U.S.C. Section 1983. In the latter case, the standard equity test for an injunction under Rule 65 cannot be employed -- as to a Civil Rights lawsuit under 42 U.S.C. Section

1983 on the record below -- a different or "heightened pleading" is required.

In Stanley v. University of So. Cal., 13 F.3d 1313, 1319 (CA9, 1994), the Court described the standard equity test for an injunction in the Ninth Circuit as follows:

> " In Martin v. International Olympic Committee, 740 F.2d 670 (9th Cir. 1984), we described the legal standard a district court must apply in exercising its discretion:
> " 'In this circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that:
> " '(1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest."
> " 'Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the

> possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction.'

"Id. at 674-75 (internal quotations and citations omitted) (emphasis in original).

" Coach Stanley argues that she did not seek a mandatory preliminary injunction. She asserts that she was 'not seeking to be instated by USC, she was seeking to continue her employment with USC.' Appellant's Opening Brief at 28. Coach Stanley maintains that she requested a prohibitory preliminary injunction and that the district court erred in applying the test for a mandatory preliminary injunction."

An analysis of Nevada Entertainment's civil rights lawsuit pursuant to 42 U.S.C. Section 1983 is made simple by

the fact that it was a simple equity complaint for an injunction -- it did not allege any claim for damages. The issuance of a preliminary injunction under this "standard" test articulated in Stanley was clearly error. The City contends that this potential error, which is easily avoided at the outset, should and must be corrected by a written opinion in this case. Not to do so only invites further bad decisions by other Courts in Huffman abstention cases.

The form of the complaint is such -- for an injunction -- that if a right to an injunction did not exist under the law, the complaint would have to be dismissed for failure to state a cause of action; that is, the federal court in that instance did not have "subject matter jurisdiction" for such an adjudication. Jurisdiction of the person (i.e. the City of Henderson, acting for

the state) does not occur until after subject matter jurisdiction has been correctly determined. See the discussion on "subject matter jurisdiction," in Jurisdiction in Civil Actions, Robert Casad (copyright 1983), at pages 1-2 through 1-5, and in 1988 Supp. at S 1-2:

> "The concept of subject matter jurisdiction was discussed at some length in Florida Power & Light Co. v. Canal Authority of Florida. [footnote omitted].
>
> '[T]he court must have what could be called potential or inchoate jurisdiction but what is more commonly and properly called "jurisdiction of the subject matter." This is jurisdiction in the abstract and is that sovereign authority, conferred upon a court by constitution, either directly or by authorized statute, to make adjudications, or binding decisions, as to controversies within a certain class of cases or causes. Such subject matter jurisdiction must be properly invoked and perfected. A court's jurisdiction is generally invoked in a given case by a party filing a proper pleading which alleges material facts demonstrating (1) the existence of a judicial controversy (a right in dispute between two or more

> parties) within the subject matter jurisdiction of the court....After the court's jurisdiction has been properly invoked, it is perfected by a proper service of sufficient process on all indispensible parties. This is called acquiring "jurisdiction over the person." [footnote omitted.]'" (Our Emphasis.)

One certain way for this Court to correct this problem in the future is to grant this petition for writ of certiorari under Rule 11, with a view to amend and amplify the Huffman abstention doctrine by holding that the lower court erred, and requiring in the future that where Huffman is pleaded as a defense that federal plaintiffs must amend their pleading (by formal heightened pleadings) under 42 U.S.C. Section 1983 to "allege" the extraordinary circumstances which will "prove" that "subject matter jurisdiction" is present, to avoid the procedural error in this case. The burden of proof in such case is on the federal plaintiff

and was not carried in this case.

The statutory basis and authority for filing the Complaint for Injunction (42 U.S.C. Section 1983) is important where the complaint is brought to enjoin a particular governmental authority or person acting on behalf of the state in a quasi-judicial capacity. As this Court noted in Mitchum v. Foster, 407 U.S. 225, at 231-232 (1972):

> "The anti-injunction statute goes back to the beginnings of our history as a nation. In 1973 Congress enacted a law providing that 'no' writ of injunction be granted (by any federal court) to stay proceedings in any court of a state."

The relief which Nevada Entertainment sought flew in the face of the Anti-Injunction Statute of 1793 and the Eleventh Amemdment [which was enacted 5 years later to correct the United States Supreme Court's 1793 ruling in Chisholm v. George, 2 U.S. (2 Dall.) 449 (1793)]. See Redish, Federal Jurisdiction (1980):

"Tensions in the Allocation of Judicial Power," Chapter 10 "The Anti-Injunction Statute" at page 259-290; and Chapter 11, "Our Federalism" at pages 291-321; and Chapter 6, "State Sovereignty, Immunity and the Eleventh Amendment" at pages 139-140; Section II, "Construction of the Eleventh Amendment: Alternative Theories," setting forth various meaning asserted to the Eleventh Amendment at pages 141-154; and Section III, "The Doctrine of Ex parte Young" at pages 154-159.

The two statutes, 42 U.S.C. Section 1983 and the anti-injunction statute (see 1948 revision at 28 U.S.C. Section 2283) are (silently) at odds with each other in the cross-appeal which is before this Court for resolution. Justice Kennedy's short definition in the City of Tempe case (supra) brings into focus the concepts discussed in Redish's treatise. Although the

decision in Mitchum v. Foster, 401 U.S. 225 (June 19, 1972), specifically held that the civil rights statute was enacted by Congress as an exception to the anti-injunction statute, that decision only heated up the controversy, in as much as the Court in Mitchum pointed out a special caveat (which applies to the Nevada situation which is before the Court) at page 242:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' Ex parte Virginia, 100 U.S. at 346, 25 L.Ed. at 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state

court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441; cf. Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7; Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116. For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, section 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law.

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746, and its companion cases. They are principles that have been emphasized by this Court many times in the past. Fenner v. Boykin, 271 U.S. 240, 70 L.Ed. 927, 46 S.Ct. 492; Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 79 L.Ed. 1322, 55 S.Ct. 678; Beal v. Missouri Pac. R. Co., 312 U.S. 45, 85 L.Ed. 577, 61 S.Ct. 418; Watson v. Buck, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 ALR 1426; Williams v. Miller, 317 U.S 599, 87 L.Ed. 489, 63 S.Ct. 258; Douglas v. City of Jeannette, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877; Stefanelli v. Minard, 342 U.S. 117,

> 96 L.Ed. 138, 72 S.Ct. 118; Cameron v. Johnson, 390 U.S. 611, 20 L.Ed. 2d 182, 88 S.Ct. 1335. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this section 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.
>
> "The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.
>
> "It is so ordered.
>
> "Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of this case." (Our Emphasis.)

The construction given the federal cause of action (by a 4-3 majority) was predicated upon the fiction of Ex parte Young, 209 U.S. 123 which assumed that the particular government officer [in that case the Attorney General of Minnesota] was acting ultra vires. In the Young case, however, the United States Supreme Court also noted that:

> "It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to

> enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U.S. 537, 542-544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wll. 366-370; Harkrader v. Wadley, 172 U.S. 148."

Two principles flowing from the above holdings in Mitchum v. Foster and Ex parte Young must be noted which are important to Petitioners' cross-appeal: FIRST if, contrary to that which has been assumed under 42 U.S.C. Section 1983, the fact is shown that the Ex parte Young fiction is untrue, and the acts taken by Petitioners were not ultra vires; then the federal cause of action

for an injunction clearly does not lie. Further, as noted above, the federal court cannot interfere where the proceedings are already pending in the state court: the Younger and Huffman doctrines are addressed as caveats in Mitchum v. Foster and applicable as exceptions to the general 42 U.S.C. Section 1983 rules of law.

It is and has been the City's contention for the four years of this litigation that a correct reading of the law expressed in Mitchum v. Foster, makes it eminently clear that as to the City's cross-appeal:

(1) for a federal judgment that Huffman abstention clearly does apply to this case;

(2) that the federal court did not have subject matter jurisdiction under Ex parte Young and Mitchum v. Foster;

(3) that the injunction was unlawfully imposed in violation of the

Eleventh Amendment;

(4) that the City Council was wrongfully enjoined and is entitled to damages; and

(5) that the cross-appeal is not moot.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

The federal complaint and proof adduced below is clearly an unconstitutional collateral attack on an enforceable Nevada state ruling. See Huffman v. Pursue, Ltd., 420 U.S. 592 at 612. Although it is and was argued that the federal plaintiffs' claim of free speech protection provides the "extraordinary circumstances," Plaintiffs provided no proof whatsoever in support of that allegation.

Unless federal plaintiffs are required to allege (by heightened pleadings) the nature of the

"extraordinary circumstances" and prove those allegations, cases will rarely be properly adjudicated.

At the time they filed their federal complaint, Plaintiffs' knew, as to any state court action and their pleading and proof, they would be concluded by the City of Las Vegas case [Las Vegas v. Nevada Entertainment, Inc., 772 P.2d 1275 (Nev.S.Ct., 1989)]. To avoid that result, they fraudulently brought this federal action as a collateral attack on the rule established in City of Las Vegas. Huffman is an absolute bar, especially here, where there was a pending state proceeding. To hold otherwise would instruct all litigants on "how" to thumb their noses at the Eleventh Amendment and avoid the rule of law expressed in Huffman.

I

THE CITY OF HENDERSON'S "HUFFMAN" CHALLENGE BEFORE THE FEDERAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED.

The City of Henderson et al.'s "Huffman" challenged before the federal court invoked four basic jurisdictional principles of law which are never waived:

(1) lack of federal (subject matter) jurisdiction;

(2) failure to state a claim ("subject matter") upon which relief can be based;

(3) state sovereignty - police power (Tenth Amendment); and

(4) right to be sued only in state court (Eleventh Amendment);

All four principles were violated by the Court of Appeals' decision of May 4, 1994. The federal plaintiffs have the burden of proof and must plead and prove the Huffman exception for federal

(subject matter) jurisdiction.

This court should resolve the issue of how to measure the federal plaintiffs' burden of proof under Huffman v. Pursue, Ltd. 420 U.S. 592 to meet the jurisdictional requirement of proving "extraordinary circumstances where the danger of irreparable loss is both great and immediate." At a minimum, before subjecting federal civil rights defendants to a trial under the instant circumstances, the federal court must first find, under its "jurisdiction to determine jurisdiction" function, the requisite "extraordinary circumstances where the danger of irreparable loss is both great and immediate," pursuant to this Court's ruling in Huffman v. Pursue, Ltd., supra at 612, as authoritatively construed by this Court the previous year in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 at 14-17 (1985).

Further, federal jurisdiction in such cases is dependent upon the "fiction" created in Ex Parte Young that the Attorney-General or state agent (here a municipality) is violating the constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its judgment that the City of Henderson had acted properly in revoking federal plaintiffs' business license (for fraud) [and thus, the state administrative action could not be invalidated based upon any showing of federal constitutional violations], the "fiction" of Ex Parte Young was dispelled and the jurisdiction of the federal court was exhausted. At that point, the federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its lack of jurisdiction and was

required to dismiss the lawsuit.

II

THE JURISDICTION ISSUE WAS NOT MOOT

The Court of Appeals in its May 4, 1994 Memorandum incorrectely held that in light of its disposition of the case (on the merits), the Huffman jurisdictional issue would be an "advisory opinion" and had therefore become "moot." Under Huffman, the Court of Appeals can never get to the issue of the merits. It is elementary that the issue of whether the Court had subject matter jurisdiction to act on the merits must be decided first, before the court acts in relation to the merits. This question does not become "moot" simply because the federal court feels that, for some unexplained reason, it would rather get to the merits and dismiss the case on that basis. As noted above at pages 33-34, in relation to the explanation of subject matter jurisdiction

found in Florida Power & Light Co., 423 So.2d 421 (Fla.Dist.Ct.App. 1982), supra at page 33, once the Court of Appeals decided the fundamental Huffman issue as to "subject matter jurisdiction," that is, that the federal court did not have subject matter jurisdiction because of the Eleventh Amendment, the "person" of the State of Nevada and the City of Henderson et al. was no longer before the federal court.

III

THE COURT OF APPEALS SHOULD BE ORDERED TO WITHDRAW ITS MAY 4, 1994 MEMORANDUM AS A DECISION WHICH IS ULTRA VIRES, BEING IN EXCESS OF THE COURT'S "SUBJECT MATTER JURISDICTION."

The Court of Appeals should be ordered to withdraw to withdraw its May 4, 1994 Memorandum as a decision which is ultra vires, being in excess of the Court's "subject matter jurisdiction" for the following reasons: (1) Having made findings of fact and conclusions of law in its Opinion and entered its Judgment on November 2, 1994 pursuant to

the Federal Rules of Appellate Procedure, Rule 36, that Huffman v. Pursue, Ltd. abstention does apply, the Court of Appeals exhausted its jurisdiction, and by operation of law and the principles of law expressed by Chief Justice Rhenquist in Huffman v. Pursue, Ltd. 420 U.S. 592 at 612-613, and the Federal Rules of Appellate Procedure, Rule 36, has ousted the federal court system, including itself, of "subject matter jurisdiction" (the "person" of the City of Henderson, acting for the State of Nevada, is no longer properly before the federal court) and, the Court thereafter, lacked the "power" to rule further in relation to the defective pleading; (2) Nevada Entertainment's federal complaint fails to plead a federal civil rights cause of action pursuant to 42 U.S.C. Section 1983 and is fatally defective in its failure to allege and prove by

"heightened pleadings" the requisite extraordinary circumstances which would cure the defect and take the case outside the Huffman rule re "subject matter" jurisdiction); (3) the fact that the Court on April 7, 1994, attempted to withdraw its November 2, 1993 findings of fact and conclusions of law, and Judgment, without expressing the reason therefore, is immaterial. The Court's April 7th action is also "ultra vires" for the same reason and the November 2, 1993 findings of fact and conclusions of law, and judgment entered on that date, remain uncontroverted (the "person" of the City of Henderson et al. acting for the State of Nevada was no longer properly before the federal court on April 7, 1994). Compare the acts of the Minnesota Attorney General in Ex parte Young, 209 U.S. 123 (1908).

IV
THE COURT OF APPEALS SHOULD BE ORDERED TO REINSTATE ITS NOVEMBER 2, 1993 OPINION.

The Court of Appeals should be ordered to reinstate its November 2, 1994 opinion (which was certified as suitable for publication) and judgment entered thereon on November 2, 1993 pursuant to the Federal Rules of Appellate Procedure, Rule 36, and arbitrarily withdrawn on April 7, 1994 (without any explanation of the reasons for such withdrawal and their refusal to address the City's jurisdictional challenge which is validated by Justice Kennedy's dissent). That Opinion and Judgment holds that Huffman v. Pursue, Ltd. abstention is controlling precedent under the three part test established by the United States Supreme Court.

V

THE COURT OF APPEALS SHOULD BE ORDERED TO AMEND ITS NOVEMBER 2, 1993 OPINION TO CONFORM TO THE LAW IN THE AIONA, CITY OF TEMPE, AND OTHER NINTH CIRCUIT CASES.

The Court of Appeals should be ordered to amend its November 2, 1993 opinion to incorporate the additional language of the Ninth Circuit Court of Appeal in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 at 1248 and 1250, fn. 10, decided four months later (March 3, 1994) which provides an answer to the "lack of jurisdiction" issue raised by the City in its cross-appeal, which issue was not discussed in the Court's November 2, 1993 opinion, and as to which the Court announced at oral argument on May 10, 1993 that it did not want to hear argumentation thereon, namely: "a district court must dismiss the federal action ... and there is no discretion to grant injunctive relief" because, for

the reasons stated in the Rooker-Feldman doctrine, and as noted by Associate Justice Kennedy in his concurring opinion in the City of Tempe case, supra, at page 1081, the federal court (both the U.S. District Court and the Court of Appeals) lack "subject matter jurisdiction" to review the City Council quasi-judicial findings of "fraud" (and therefore, the "person" of the City of Henderson et al. acting for the State of Nevada is not properly before the federal court) in either ongoing quasi-judicial proceedings (Huffman) or by collaterally attacking final state judgments (Rooker-Feldman, infra).

VI

THE COURT OF APPEALS SHOULD BE ORDERED TO VACATE ITS MAY 4, 1994 MEMORANDUM DECISION AND ITS CONCOMITANT ORDER THAT ITS MEMORANDUM DECISION MAY NOT BE CITED.

The Court of Appeals should be ordered to vacate its May 4, 1994 Memorandum decision, and its concomitant

order that such May 4, 1994 decision may not be cited as precedent, on the ground that such federal court rulings are arbitrary and capricious and in derogation of the fundamental common law principles which underlie the determination of: "precedent," the judicial construction and interpretation which must be given to the First, Tenth, Eleventh and Fourteenth Amendments to the U.S. Constitution; and the settlement of the many raging legal controversies (including the "lack of jurisdiction" controversy in the City's cross-appeal) which daily confront the three members of this Court and the 35 other judges now sitting on the en Banc Ninth Circuit Court of Appeals.

The publication and filing of the May 4, 1994 Memorandum decision is an ultra vires act which is in excess of the Court of Appeals' <u>subject matter jurisdiction</u> and in derogation of the

"subject matter jurisdiction" Rule of Law established by the United States Supreme Court in its Huffman-Middlesex abstention doctrine, infra, and the long standing Rooker-Feldman doctrine. The Court of Appeals deliberate review of the "merits" of the Henderson City Council's quasi-judicial finding of "fraud" in an on going Nevada State license revocation proceedings at this (late) stage of the litigation and long after the injunction (harm) and constitutional wrong had been inflicted, for an ulterior motive, such as avoiding the need to address the jurisdiction Rule of Law mandated by the United States Supreme Court's Huffman-Middlesex abstention which is the central issue in four years of litigation and the primary issue before the Court of Appeals on the City's cross-appeal, flies in the face of, and stands as a mockery of the

jurisdictional rule of law established by the United States Supreme Court in Huffman abstention litigation which precludes any federal jurisdiciton to rule in relation to any state case, wherein the Huffman abstention doctrine applies, because the "person" of the City of Henderson et al. acting for the State of Nevada is no longer properly before the federal court.

The May 4, 1994 Memorandum Decision, in refusing to address the "lack of jurisdiction" issue, is in direct conflict with the decisions of other Ninth Circuit judges in Huffman abstention cases; who have experienced no such reluctance in articulating the "lack of jurisdiction" concept. [See World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion):

KENNEDY, Circuit Judge, concurring:

"General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and Huffman squarely controls. I concur in the judgment." (Our Emphasis.)

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 (Poole, Wiggins, T.G. Nelson) at 1248:

"If these three circumstances exist, then 'a district court must dismiss the federal action ... [and] there is no discretion to grant injunctive relief.' Fresh Int'l Corp., 805 F.2d at 1356 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1245, 47 L.Ed.2d 483 (1976))." (Our Emphasis.)

and 17 F.3d at 1250, fn. 10 (CA 9, 1994):

"Any possible plaintiffs either would have license revocation proceedings pending in state court, in which case Younger abstention applies, or would be collaterally attacking final state judgments, in which case the Rooker-Feldman doctrine applies. See MacKay v. Pfeil, 827 F.2d 540, 543-45 (9th

Cir. 1987)." (Our Emphasis.)

Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353 (Schroeder and Fletcher, U.S. Circuit Judges; Rosenblatt, U.S. Dist. Court Judge), at 1356, fn. 2 (CA 9, 1986):

> "....Although the abuse of discretion standard may be appropriate for other forms of abstention because they involve the discretionary exercise of a court's equity powers, [citations omitted], application of the Younger abstention doctrine is absolute. Because a district court has no discretion to issue injunctive relief in the Younger context, Colorado River Water Conservation District v. United States, 424 U.S. at 816 n. 22, 96 S.Ct. at 1246 n. 22, the abuse of discretion standard is inappropriate." (Our Emphasis.)

Partington v. Gedan, 880 F.2d at 116, at 129 (CA 9, 1989):

> "... such an attack on State v. Clarke implicates the Rooker-Feldman doctrine forbidding lower federal courts to sit in direct review of state court judgments. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed.

362 (1923); see also MacKay v. Pfeil, 827 F.2d 540, 543-45 (9th Cir. 1987) (per curiam); Worldwide Church of God v. McNair, 805 F.2d 888, 890-93 (9th Cir. 1986) (Worldwide Church of God)."

Partington v. Gedan, 961 F.2d 852, at 864 (CA 9, 1992):

"4. Claims 2 & 7."

"The district court dismissed Claim 2 and Claim 7 on the ground that it had no jurisdiction under the Rooker-Feldman doctrine and the Eleventh Amendment to grant the relief requested. (Our Emphasis.)

"....

"....although the plaintiff could challenge the constitutionality of the state-court rule in federal court, he could not challenge state-court decisions in particular cases arising our of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." Id., at 486, 103 S.Ct. at 1317 (emphasis added); accord Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). Under the "Rooker-Feldman doctrine," review of state court decision may only be conducted in the United States Supreme Court. Lower federal courts may not review such decisions." (Our Emphasis.)

VII

THE COURT OF APPEALS SHOULD BE ORDERED TO REMAND THE CASE TO THE UNITED STATES DISTRICT COURT FOR A HEARING ON THE INJUNCTION BOND AND DAMAGES TO THE CITY BY VIRTUE OF THE WRONGFUL INJUNCTION AND THE CITY'S RIGHT AS THE PREVAILING DEFENDANT ON THE HUFFMAN ABSTENTION DOCTRINE TO AN ATTORNEY FEE UNDER 42 U.S.C. SECTION 1988 ON THE GROUND THAT THE FILING WAS IN BAD FAITH, FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

The Court of Appeal should be ordered to remand the case to the U.S. District Court for:

(a) a further hearing on the $20,000 injunction indemnification bond and the damages to the City of Henderson arising out of the Eleventh Amendment injury and wrongful injunction of four years duration [see Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032 at 1036 (CA 9, Feb. 17, 1994)] which has prevented the City from enforcing the City Council's quasi-judicial law enforcement Order which revoked Nevada Entertainment's right to operate in the City of

Henderson as an adult business; and

(b) a determination as to whether the City of Henderson is entitled to an award of an attorney fee at trial and on appeal under 42 U.S.C. Section 1988, as the prevailing defendant on the Huffman-Middlesex abstention doctrine issue under the test proscribed in Hughes v. Rowe, 448 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 at 198 (per curiam) and the City's claims that Nevada Entertainment filed the 42 U.S.C. Section 1983 Civil Rights Action in the federal court during the stay period and while the license revocation determination was an issue which was still pending in the state court system:

(1) in subjective and objective "bad faith," as those terms are used in determining attorney fees under the Common Law rule and 42 U.S.C. Section 1988;

(2) with a fraudulent intent,

to avoid an adverse decision in the Nevada Supreme Court which was certain to result in a state appeal from the City Council's quasi-judicial finding of "fraud" under the prevailing state law precedent which considered the identical problem in the fraudulent procurement of a business license issued pursuant to Nevada state law in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. S.Ct. 1989); and

(3) with the full knowledge of its attorneys, who had a substantial practice in this area of the law, and were well schooled on "civil rights" and "abstention" issues and had a working knowledge of the legal effect of the U.S. Supreme Court precedents in Huffman v. Pursue, Ltd., supra, Middlesex Ethics Commission v. Garden State Bar Exam, 457 U.S. 423, 432 (1982), Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and New Orleans Public Sev. Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350, 369 (1989), and Ninth Circuit cases [World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion); Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248 and 1250, fn. 10 (CA 9, 1994); Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d at 1353, at 1356, fn. 2 (CA 9, 1986); Partington v. Gedan, 880 F.2d at 116, at 120 (CA 9, 1989); Partington v. Gedan, 961 F.2d 852, at 864 (CA 9, 1992)], and their decision to file the civil rights lawsuit in the federal court rather than in the state court, as is allowed under the Nevada judicial procedure (where "subject matter jurisdiction" would not have presented an issue as in this case) was

for the purpose of "testing the waters," and was frivolous, unreasonable, and without foundation as those terms are used in 42 U.S.C. Section 1988.

Further, federal plaintiffs, Nevada Entertainment Industries, Inc. et al., are well aware of the fact that had they prevailed in the Civil Rights lawsuit (42 U.S.C. Section 1983), they would, as the prevailing plaintiff, have been entitled to, and would have been awarded an attorney fee, and, must be held to have assumed the mutual risk of paying attorneys fees to the City in this case for their wrongful election to file the federal complaint and their failure to prevail on the issue which the United States Supreme Court had previously decided against them. The erroneous claim of amicus curiae, speaking on behalf of federal plaintiffs, that footnote 4 in New Orleans Public Service, Inc. v. Council of New Orleans,

491 U.S. 350, at 369, 109 S.Ct. 2506 (1989) made the Dayton case "dictum" is a factor which confirms the necessity of the issuance of a writ of mandamus in this case so that such misconception may be put to rest.

CONCLUSION

The petition for a writ of mandamus, or writ of certiorari under Rule 11, should be granted.

Dated: June 2, 1994

Respectfully submitted,

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Counsel of Record
For Petitioners

Supreme Court, U.S.
NOV 9 1994

No. 94-662

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

Petitioners,

vs.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

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TABLE OF AUTHORITIES

New Orleans Public Service, Inc. v. Council of City of New Orleans (1989) 49 U.S. 350, 109 S.Ct. 2506 3

Younger v. Harris (1971) 401 U.S. 37, 91 S.Ct. 746 3, 7

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PETITIONERS

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RESPONDENTS

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Respondents Nevada Entertainment Industries, Inc. and Daniel Bishop, (hereinafter " Nevada Entertainment Industries"),

pursuant to Rule 12.4, hereby support Petitioners' request to review the Ninth Circuit's decision.

Respondents filed their own Petition, (No. 94-786), to review the same judgment for other reasons independent of the Petition in the instant case. The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court, having previously and expressly left open, should now resolve.

The open issue involves the critically important abstention doctrine and its application to Civil Rights litigation and related administrative proceedings. While

Respondents strongly disagree with Petitioners as to how this Court should resolve the issue, they do agree that this Court should accept this case to resolve the issue. The issue is whether the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) should apply to cases where the administrative action has become final.

In footnote 4 of its Opinion in New Orleans Public Service, Inc. v. Council of City of New Orleans, 49 U.S. 350, 109 S.Ct. 2506 (1989), this Court expressly stated that the issue was left open. Specifically, this Court stated in NOPSI,

"In Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), we held that the Younger doctrine prevented an injunction against an ongoing sex-discrimination proceeding before the Ohio Civil Rights Commission. The only other decision of ours arguably applying Younger to an administrative proceeding, Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982), similarly involved a situation in which the proceeding was not yet at an end. The fact that Dayton Christian Schools relied, as an alternative argument, upon the fact that the federal challenge could be made upon appeal to the state courts, see 477 U.S., at 629, suggests, perhaps, that an administrative proceeding to which Younger applies cannot be challenged in federal court even after the administrative action has become final. But we

> **have never squarely faced the question."** (Some emphases in original, some emphases added.) ___ U.S. at ____, 109 S.Ct. at 2518-2519, n.4.

In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question.

Respondents have an interest in having this matter resolved because the decision of the United States Court of Appeals for the Ninth Circuit in the instant case was initially published at 8 F.3d 1348 (9th Cir. 1993) and although later withdrawn, the various

district courts had been relying upon the "reasoning" of the Ninth Circuit to abstain in deference to local administrative proceedings. This has created great uncertainty in the "First Amendment Bar," and in those local City Attorneys who have to deal with issues involving adult bookstores, adult cabarets, and similar establishments. Because of the Ninth Circuit's decision below (although withdrawn), more adult bookstores, cabarets, and similar businesses are avoiding local administrative proceedings altogether and filing directly with the federal courts so as to avoid the abstention doctrine altogether. That is, the decision

of the Ninth Circuit below is causing many in the industry to avoid administrative proceedings altogether for fear of loosing their right later on to go to the federal court in case it should become necessary. There is a great deal of uncertainty that could be resolved by the grant of certiorari in this case.

Respondents, of course, are of the opinion that Younger does not apply after the administrative action has become final. The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion which is the subject of the Petition for Writ of Certiorari in the companion

case.

Accordingly, Respondents join in Petitioner's request that Certiorari be granted herein.

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Respondents

Supreme Court, U.S.
FILED
NOV 28 1994
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RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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DOCKETED ON OCTOBER 11, 1994

96 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....ii

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED..... 1

II. STATEMENT OF THE CASE..... 4

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION..... 4

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.....16

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.....20

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140..... 7

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).....2, 4, 9, 11, 14, 19, 20

Luian v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331..... 7

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993).....17

Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826 (1989)..... 7

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc. 477 U.S. 619 (1986).....2, 3, 4, 16, 17, 20

Watson v. Buck, 313 U.S. 367 (1941)..... 9

STATE CASES

City of Las Vegas v. Nevada Industries, 772 P.2d 1275.....18

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
Eleventh.....2, 6, 7, 9, 10, 11, 15, 18, 19, 20

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

42 U.S.C.
Section 1983..... 6
Section 1988.....13

FEDERAL RULES

U.S. Supreme Court Rules
Rule 15.1 16
Rule 16.1 17

TEXTS

Stern, Gressman, Shapiro and Geller, Supreme Court Practice, (Seventh Ed.).....18

EDITOR'S NOTE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED.

At pp. 2 and 5 of the Response Brief filed on November 9, 1994, Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment") has mischaracterized both the trial facts and the single legal issue which Nevada Entertainment has challenged. See p. 2, reading:

> "The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court having previously and expressly left open, should now resolve." (Our Emphasis.)

See page 5, reading:

> In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question." (Our Emphasis.)

In this Reply Brief, the City of Henderson submits that the excerpts of record on Nevada Entertainment's appeal and the City of Henderson's Cross-Appeal and the appellate records in this Court in

Case Nos. 90-1771, 92-643, and 93-1969 and at pages 7-29 of this Petition for Writ of Certiorari in Case No. 94-662, establish both as a historical fact and as a matter of law that the federal civil rights complaint which Respondent Nevada Entertainment, a citizen of the State of Nevada, filed in the U.S. District Court for the District of Nevada on April 24, 1990 directly interfered with the progress of the State of Nevada quasi-judicial (administrative) proceeding, which was then pending, and that said filing of a federal civil complaint of that nature, regarding a quasi-judicial matter which is properly before a Nevada tribunal, by a Nevada State citizen: (1) is forbidden by the Eleventh Amendment (i.e. the federal court lacks "subject matter jurisdiction"), and (2) was prohibited by this Court's landmark "abstention" decision in 1975 in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, and its more recent "binding" holding in 1986 in Ohio Civil Rights Commission v.

Dayton Christian Schools, Inc., 477 U.S. 619, at 629.

Nevada Entertainment's statement that the procedural historical facts in the trial court below are that: "Respondents filed their civil rights action after the decision of the City council became final" is an "egregious" misstatement of the trial record on appeal because: (1) an "abstract" statement of this nature, without reference to the record, is pointless; (2) it is true, both as a historical fact and as a matter of law, that the temporary restraining order and the preliminary injunction which were issued in Nevada Entertainment's federal civil rights action actually prevented the City Council's quasi-judicial order from becoming "final;" (3) it is true, both as a historical fact and as a matter of law that, from a procedural viewpoint the trial facts in this Petition cannot be distinguished from the trial facts in this Court's binding precedent in 1986, in Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, at 629 (1986), which extended the abstention doctrine expressed as to State judicial proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, to include quasi-judicial administrative proceedings; and (4) during the four years of litigation, three prior petitions on file in this Court have correctly stated and given notice that the record herein tracks the trial facts in Huffman, supra, which is binding upon the federal courts and Respondent has, nevertheless, recklessly continued to litigate. See "Statement of Facts" in No. 90-1971 at p. 22, 92-643 at pp. 5-12 and 19; 93-1969 at p. 15, and 94-662 herein, at pp. 4-36 generally, pp. 10-11 specifically.

II. STATEMENT OF THE CASE

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION.

At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief).

The concluding paragraph of the City Council's written order, dated April 16, 1990, which was served on Nevada Entertainment, read as follows (see Appellant's Excerpts Exhibit 1, pp. 2-3):

> "Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a/ FANTASY VIDEO PLUS, orders written notice of its decisions to licensees within five

(5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

[Signatures of Council]"

As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still "pending" up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day "stay" period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring "subject matter jurisdiction" on such

date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief.

The date ("April 24, 1990") is of paramount importance, because "the existence of federal 'subject matter jurisdiction' ordinarily depends on the facts as they exist when the complaint was filed in the U.S. District Court." See Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331, at fn. 4, emphasizing the above language and citing Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826, 104 L.Ed.2d 893, 109 S.Ct. 2718 (June 12, 1989) at 900; see also Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140, at 1143:

> "As a general rule, the proper point of reference for determining whether state proceedings are 'ongoing' is

the date the federal complaint is filed. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S.Ct. at 1529-30....See also Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceedings is pending when federal complaint is filed); Thomas v. Texas State Bd. of Medical Exam, 807 F.2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

"....

"The Younger line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. See, e.g., Younger, 401 U.S. at 44, 91 S.Ct. at 750; Huffman, 420 U.S. at 601-04, 95 S.Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' Cf. Huffman, 420 U.S. 604, 95 S.Ct. at 1208; Steffel, 415 U.S. at 462, 94 S.Ct. at 1217."

A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have "subject matter jurisdiction" on April 24, 1990, must, of necessity, follow from the "command" of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that "command" in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387 (1941). See also Questions I-IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii. a copy of which is attached at Appendix 3 to this Brief. It follows therefrom that Nevada Entertainment used the power of the federal court in an unlawful (Eleventh Amendment violation) tortious and unconstitutional manner, through the issuance and

enforcement of an unlawful (Eleventh Amendment violation) tortious, unconstitutional federal court temporary restraining order (April 27, 1990) and an unlawful (Eleventh Amendment violation) tortious, and unconstitutional preliminary injunction (May 30, 1990) (See copy of Injunction Orders in Appellants' Excerpts of the Record at Exhibits 2 and 3), to: (1) extend the City Council's 10 day stay indefinitely, and (2) unlawfully, tortiously, and unconstitutionally prevent the City Council's quasi-judicial Order of April 16, 1990 from becoming a final enforceable order, which could be used to execute the will of the City Council acting as an agent for the Sovereign State of Nevada.

Petitioner City of Henderson contends that the "impasse" which such injunction order created was subjectively brought to the attention of U.S. District Court Judge Lloyd D. George in June of 1992 when he first attempted to force the City to trial in the federal Court against its will.

Prior thereto, the City had added defensive pleas of "Res Judicata" and "collateral estoppel" to its continuing plea of "lack of subject matter jurisdiction." At that time, Judge Lloyd D. George must have become aware of the Eleventh Amendment impasse which arose out of the City's Huffman abstention challenge; i.e. that the City Council's quasi-judicial order of revocation had been "stayed" by his injunction order, and had not become final and, therefore, such pleas of "res judicata" and "collateral estoppel," though pleaded, would not be available to the City as a defense in the federal trial; for, at that time, and, on his own motion, he reversed his initial ruling, suspended the trial procedure and, thereafter, certified the matter for an interlocutory appeal to the Ninth Circuit. See Statement of Facts in the Petition herein at pp. 22 and 23.

The "impasse" which was created by such federal injunction order was also

brought to Nevada Entertainment's attention after U.S. District Court Judge Lloyd George filed his final judgment on November 27, 1992 (see copy in Appellants Excerpts of Record, at Exhibit 7). At that time, Nevada Entertainment filed a petition for rehearing with the City Council, which must be interpreted as a recognition and judgment on its part that the matter was still "pending" before the City Council because the federal court's temporary restraining order and preliminary injunction order which it served on the City had indefinitely extended the stay which it had obtained from the City Council to allow it to take a "proper" appeal. However, the City Council could not act on the matter because the trial court's injunction, which U.S. District Court Judge Lloyd George had lifted, was immediately continued -- this time at the request of Nevada Entertainment and at the instance of the Ninth Circuit Court of Appeals -- and has not yet been lifted. The Parties

by stipulation, have stayed the mandate to await this Court's ruling on this matter, including the City's right to recover attorney's fees as a prevailing defendant under the Dayton Christian Schools case and 42 U.S.C. Section 1988, and damages under the injunction bond which the United States District Court set when the federal court's injunction was placed in effect. (See Statement of Facts in the Petition herein at p. 28).

The trial facts clearly establish that Nevada Entertainment's Attorney did not (as it might have done) wait until May 2, 1990 to file its federal lawsuit, on which date the City Council's 10 day stay order would have lapsed, and the City Council's revocation order would then have "become" final. Such a fact situation (not here present)[1] would have presented a

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[1] For an example of an attempt to state such a case (not here present), see (Footnote Continued)

different case and controversy and different federal questions as to whether, in such cases, a federal plaintiff could show, by extinsic evidence that the Huffman abstention doctrine did not apply because he was bringing a new and independent case in the U.S. District Court, and

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(Footnote Continued)
the petition for writ of certiorari in Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., No. 94-786 which was docketed on October 7, 1994, and served on the City of Henderson by mail on October 29, 1994. Because the petition herein establishes that the Eleventh Amendment does not permit Nevada Entertainment to file a federal lawsuit under the historical facts set forth herein in Case No. 94-662, the City of Henderson considers the filing of Case No. 94-786 to be a "frivolous" filing, and has addressed that issue in the Supplemental Brief which is being filed concurrently with the Reply Brief herein (case No. 94-662) and will further address that issue and Nevada Entertainment's untrue Statement in this Petition at p. 7, reading:

> "The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion."

in a Response Brief and Cross-Petition in Case No. 94-786. See, also, Statement of Facts in the petition herein in No. 94-662 at pages 38-39.

had abandoned the litigation in his state case, and was willing thereby to accept and suffer the potential risk of defeat under a "res judicata" and "collateral estoppel" defense.

Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the

City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish "standing" at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.

The duty of a Respondent to respond in a brief in opposition to a Petition for Writ of Certiorari is set forth in Rule 15.1 as follows:

> "Brief in Opposition.
> "...the brief in opposition should address any perceived misstatements of fact of law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition."

Further, Rule 16.1 provides that, after consideration of the papers, the Court may make a summary disposition of the merits. Because the record on appeal herein is clear that this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) is a binding precedent and controls the disposition of this case [which the Ninth Circuit so held in its first opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)], see Statement of Facts in the Petition herein at pp. 38-39, this Court is presently empowered to grant summary relief to

Petitioner without setting the issue for oral argument. See Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, Seventh Edition at pp. 250 et seq., "(c) Summary Disposition of the Merits by Per Curiam Opinion." Petitioner submits that such a disposition would not be proper in this case because of the preeminent importance of the City of Henderson's additional claims of: (1) Eleventh Amendment injury and (2) the federal court's lack of subject matter jurisdiction, both of which are of national interest to all of the states.

Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copies at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the

States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., Case No. 94-786. Further, there is a continuing problem in the Ninth Circuit and other Circuits, with the correct application of the test to be applied in ruling on Huffman abstention challenges, and a serious need for a comprehensive opinion of this Court to settle the present abstention problem and controversy in the Ninth Circuit; that is, the divergent views of the 38 individual Ninth Circuit Court judges, and a refusal of some: (1) to "recognize" the Eleventh Amendment foundation of the Huffman abstention challenge, and (2) to defer in proper cases to the sovereign right of state courts to rule on important State interests under the Eleventh Amendment. This issue is further addressed in a Supplemental Brief in Case No. 94-662 and in the City's

Cross-Petition to Nevada Entertainment in Case No. 94-786, concurrently being filed.

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.

Petitioner cannot envision a "riper" "test case" in which to examine the merits of the City's claim that the refusal to apply Huffman abstention doctrine is the direct cause of the City's Eleventh Amendment injury. The Statement of Facts clearly documents: (1) a refusal of the U.S. District Court and the Ninth Circuit Court of Appeals to apply the "binding" rule of law established by this Court in its Huffman and Dayton Christian Schools abstention decisions; (2) judgments of both Courts which contravene the State of Nevada's rights under the Eleventh Amendment; and (3) Eleventh Amendment constitutional injury to the City of Henderson and the State of Nevada which is patent on the face of the record.

Dated: November 26, 1994

James J. Clancy

APPENDIX 1

STATEMENT OF FACTS IN PETITIONER'S SUPPLEMENTAL BRIEF IN NO. 92-643, AT PAGES 4-12.

[Refer: pp. 5 & 15 of Reply Memorandum.]

Text at page 5 reads:

"At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief)."

Text at page 15 reads:

"Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

"Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)."

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much." (Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

APPENDIX 2

COPY OF FEDERAL COMPLAINT

[Reference: pages 6 and 7 of Reply Memorandum.]

Text at pages 6-7 reads:

"As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still 'pending' up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day 'stay' period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring 'subject matter jurisdiction' on such date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief."

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State Bar No. 40146

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs, vs. CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants.	CV No. CV-S-90-264-LDG-LRL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. FILED: APRIL 24, 1990

Plaintiffs, Nevada Entertainment Industries, Inc. and Daniel Bishop allege as follows:

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983 in that this is an action by

Plaintiffs with regard to their attempt to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution; they are seeking to enjoin the Defendants from closing their constitutionally protected business.

2. Venue lies in the Southern Division of the District of Nevada; the City of Henderson is located in Clark County, Nevada, which is within the jurisdiction of the Southern Division.

3. Plaintiff Nevada Entertainment Industries, Inc., is, and at all times mentioned herein, was a corporation duly authorized and created by the laws of the State of Nevada. Plaintiff Daniel Bishop at all times mentioned herein, was and is the President of Nevada Entertainment Industries, Inc. and would be subject to criminal sanctions should Defendants not be enjoined from closing the subject business.

4. Defendant City of Henderson was and is, at all times mentioned herein, a

municipal corporation duly created by the laws of the State of Nevada and was and is located within Clark County and the Southern Division of the District of Nevada.

5. Defendant James Goff is sued in his official capacity as Chief of Police of the City of Henderson.

6. This action relates to the attempt by Plaintiffs to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution. The business is known is Fantasy Video Plus and is located at 1100 North Boulder Highway, Henderson, Nevada.

7. Defendants contend that the business in question (Fantasy Video Plus), is an adult business within the meaning of Henderson Municipal Code §19.16.006(B). For the purpose of this lawsuit, Plaintiffs will concede that the subject business, Fantasy Video Plus, is an adult business within the meaning of §19.16.006(B) of the Henderson Municipal Code.

8. On February 17, 1989, Plaintiffs

desired to commence a business in the City of Henderson wherein books, magazines and novelties would be sold and motion picture films (video tapes) could be sold and/or rented and exhibited. Plaintiffs desired, with respect to such business, to sell, rent, and exhibit materials protected by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs located a parcel of property at 1100 North Boulder Highway, Henderson, Nevada. On February 17, 1989, Plaintiffs entered into a five year lease for the premises at 1100 North Boulder Highway, Henderson, Nevada 89015. The premises consisted of a structure with 3,200 square feet of floor area. The lease would commence on April 1, 1989 and last until April 1, 1994.

10. At the time the lease was made, the City of Henderson had already enacted (May 1983), Chapter 4.102 of the Henderson Municipal Code regarding "video rental stores."

11. Henderson Municipal Code §4.102.020 required all "video rental stores" (defined as establishments which derived its gross profits from the sale or rental of sexually explicit movies, films or tapes) to certify that no such films would be sold or leased to persons under the age of 21.

12. With the exception of Chapter 4.102, Defendant City of Henderson did not further regulate premises selling or renting "adult films."

13. It was the intention of Plaintiffs to exhibit, sell, and/or rent the kinds of materials described in Chapter 4.102 of the Henderson Municipal Code (video rental stores).

14. The general requirements for obtaining a business license were set forth in Title 4 of the Henderson Municipal Code entitled "Business Regulations and License."

15. On March 7, 1989, after Plaintiffs executed their lease on February 17, 1989, Defendant City of Henderson adopted

Ordinance No. 1112 which repealed in its entirety former Chapter 4.04 entitled "Business Regulations and Licenses" and which replaced it with a new Chapter 4.04 entitled "Business Regulations and Licenses."

16. Accordingly, since the adoption of Ordinance No. 1112 on March 7, 1989, Defendant City of Henderson has been regulating businesses and has been determining whether or not to issue business licenses based upon the provisions of the new Chapter 4.04 which was adopted by Ordinance No. 1112.

17. By virtue of Henderson Municipal Code §4.04.020, all businesses in the City of Henderson must have a license issued by the City of Henderson.

18. Henderson Municipal Code §4.04.020 provides as follows:

> "(a) It shall be unlawful for any person to commence, carry on, engage in or continue in the City any business without first

obtaining a license and paying the appropriate license tax as provided by terms and provisions of this Title.

(b) A license shall only be issued if the applicant has a fixed place of business from which the business will be conducted, unless the Title specifically states otherwise. Once issued a license, the licensee shall not engage in business from any other premises other than the one for which the license was issued.

(c) No licensee shall allow another person to display a license on the licensee's premises, or to in any way allow any other person to use the licensee's premises to conduct business unless expressly permitted by the Division.

(d) Upon the filing of a

complete and accurate business license application and the payment of all required license fees, the applicant may be issued a temporary business license by the Division; provided, however, that the requirements of all appropriate federal, state, and county regulatory agencies have been met; and that the requirements of all Departments or Divisions of the City have been meet and properly approved. The temporary business license shall permit the applicant to engage in the business designated at the location so stated for a period of up to, but not to exceed sixty (60) days, within which all inspections and requirements imposed upon the applicant by the various Departments or Divisions of the City are to be complied with.

Upon the recommendation by the various Departments or Divisions within the City, the Division shall have the discretion to extend a temporary business license for a period of an additional sixty (60) days. It shall be the sole responsibility of the applicant to schedule all follow-up inspections necessary to comply with all the requirements and corrections. Should the applicant have not met the requirements as set forth by the Departments or Divisions of the City within the maximum prescribed time limit of one hundred twenty (120) days, the temporary license shall be deemed expired. Continued operation of the business shall constitute a violation of this Title, and the business shall be subject to legal action as prescribed by

this Title, the penalties for which are described in Section 4.04.230.

(e) The above stated provisions for a temporary business license shall be in addition to those provisions applying to privileged business licenses or any business which requires formal approval by the Council, unless the Director has first given tentative approval in accordance with section 4.04.170.

19. Henderson Municipal Code Section 4.04.150 sets forth the grounds for denial, non renewal, suspension, limitation and revocation of licenses. Specifically, Section 4.04.150 provides as follows:

"It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of

this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this title.

(a) Any license or permit application made pursuant to the provisions of this title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information required by this Title;

(2) All license and investigation fees are not paid;

(3) False or fraudulent statements

in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) The applicant, or any of its principals, do not qualify for, or have not obtained work card identification as may be required by the Division;

(6) A finding by the Division or by the Council that said business will not comport with the peace, health, safety, convenience, good

morals, or the general welfare of the public; (7) Lack of fitness of the applicant to engage in the particular occupation of business. For the purpose of this section, lack of fitness shall be defined as that quality or character of the license applicant which tends to establish that the applicant will not perform the services to be provided under his license or permit in a reasonable manner to the public. Particular factors to be taken into consideration by the Division or by the Council in determining whether the applicant

is unfit, are whether the applicant has a bad moral character, has intemperate habits or a bad reputation for truth, honesty, or integrity, or has a prior criminal conviction and/or a prior license denial, suspension, limitation or revocation, either locally or in another state or community, to the extent that it is possible that the acts which formed the basis of the conviction, denial, suspension, limitation, or revocation may be committed by the applicant under the license or permit being

applied for. In the event the applicant is a company, partnership, association, corporation, or other business entity, the Division or the Council may consider the fitness of each of the applicant's owners, partners or directors.

(8) For any other cause by the City through its Division or Council to be a just or equitable reason.

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be limited to

the following:

(1) The conduct of the business in an unlawful, improper, or irregular manner;

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) The existence of unsanitary conditions at, near, or in the premises which causes or tends to create a public nuisance or which injuriously

affects the public health, safety or general welfare;

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) The commission of, or permitting or causing the commission of any act in the operation of the business which act is made unlawful or is prohibited by any ordinance of the City, county, state or federal government;

(7) For any other cause by the City through its Division or its Council to be a just or equitable reason.

(c) All business licenses issued under this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable."

20. Henderson Municipal Code §4.04.200

authorizes certain Henderson officials to enforce the ordinance by citations and arrests. Those with enforcement powers include police officers as well as the Director of Licensing and his agents.

21. Henderson Municipal Code §4.04.220 provides that the violation of any provision of the Code is a misdemeanor.

22. Shortly after Defendant City of Henderson adopted Ordinance No. 1112, portions of which are quoted above, the City of Henderson also adopted Ordinance No. 1120, which enacted Titles 18 and 19 of the Henderson Municipal Code. Ordinance No. 1120 was a comprehensive revision of the Zoning Code and zoning law of the City of Henderson. On April 4, 1989, by Ordinance No. 1120, Defendant City of Henderson repealed its prior ordinances regarding zoning, and, as stated, replaced them with a new comprehensive "Development Code." Said Development Code purported to regulate zoning in the City of Henderson and still purports to regulate zoning in the City of

Henderson.

23. Prior to April 4, 1989, it was lawful for Plaintiffs to operate their proposed business at the property leased by them on February 17, 1989. That is, the property was commercial in nature and permitted the establishment of the business intended to be operated by Plaintiffs.

24. At the time Plaintiffs leased their property for the business in question, their property was zoned commercial (CC).

25. However, after the adoption of Ordinance No. 1120 on April 4, 1989, the City of Henderson purported to regulate where "adult businesses" could be located in the City of Henderson. That is, the effect of Ordinance No. 1120 adopted April 4, 1989, was to prevent Plaintiffs from commencing the business they intended to commence when they first leased the property on February 17, 1989.

26. Ordinance No. 1120 purported to allow adult businesses to exist only in one zone of the City of Henderson, the newly

created "CH" zone.

27. Section 19.16.006(B) of the Henderson Municipal Code provides as follows (Ordinance No. 1120):

> "Adult Businesses. Establishments based primarily on materials or performances that depict, describe, or relate to "specified sexual activities", as defined in Chapter 19.12."

28. Section 19.12.006(DE) of the Henderson Municipal Code provides as follows:

> "Sexual Activities, Specified: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, oral copulation, or sodomy; fondling or other erotic touching of human genitals (pubic region) buttocks, or female breasts."

29. Section 19.24.002 of the Henderson Municipal Code specifies the following with

respect to the "CH" Highway commercial district zone":

> "To provide sites for the auto-oriented commercial uses, including hotels, motels, service station, car washes, automobile sales and services, drive in restaurants, offices, limited warehousing and commercial services."

30. By virtue of Henderson Municipal Code §19.24.004, adult businesses, including bookstore and motion picture arcades, were and are only permitted in the "CH" zone and, within such zone, allowed only "with use permit, subject to location requirements set forth in Henderson Municipal Code Licensing Regulations."

31. After Defendant City of Henderson adopted its revised zoning law on April 4, 1989, no parcel of property in the City of Henderson was zoned "CH." Thus, nowhere in the City of Henderson could one lawfully operate an adult business, such as an adult

bookstore and arcade. Although the City of Henderson adopted the zoning provisions quoted above on April 4, 1989, the City did not establish any zone known as the CH zone. Thus, after April 4, 1989, the City of Henderson effectively prohibited adult bookstores and arcades from operating anywhere within the City of Henderson, in violation of the First and Fourteenth Amendments to the United States Constitution (Schad v. Borough of Mount Ephraim, 452 U.S. 61 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

32. Since the City of Henderson after April 4, 1989 effectively banned throughout its territory all adult bookstores and arcades by zoning ordinance, the zoning ordinance was a nullity, being unconstitutional on its face. In effect, the City of Henderson by violating the principles set forth by the United States Supreme Court in Schad v. Borough of Mount Ephraim, supra, had no zoning law regarding adult bookstores

and motion picture arcades.

33. Although, as stated above, Defendant City of Henderson totally prohibited adult bookstores and arcades from operating anywhere in the City of Henderson, in violation of the First and Fourteenth Amendments to he United States Constitution, Defendant City of Henderson also required that any such business obtain both a business license and a conditional use permit.

34. One may not obtain and/or retain a business license from Defendant City of Henderson if one's business is not zoned properly or if it does not have a required conditional use permit.

35. In addition to needing a business license as set forth above, Plaintiffs also needed a conditional use permit pursuant to Section 19.74.012 of the Henderson Municipal Code.

36. In order to obtain a conditional use permit, Plaintiffs would have to establish and the City Council would have to

find, among other things,

"That the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the Comprehensive Plan; will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City. . . ."

37. As stated above, after April 4, 1989, the City of Henderson was maintaining and did maintain an unconstitutional system with respect to adult bookstores and motion picture arcades in that, among other things, there was no property zoned CH and therefore no property on which such a business could be operated; in addition, even if there were such properties zoned CH, such business

would have to obtain a business license under the standards set forth above and also obtain a conditional use permit under the standards set forth above, such standards being unconstitutionally vague and unenforceable.

38. On August 31, 1989, Plaintiffs duly filed their application for business license. At the time Plaintiffs applied for their business license, they were informed by an official of the City of Henderson that there was no place in the City of Henderson were one could lawfully operate an adult bookstore and motion picture arcade. Therefore, if their application described the business as an adult business, Defendant City of Henderson would be compelled to deny the application.

39. On August 31, 1989, Plaintiffs submitted a written application on a form provided by the City of Henderson. Under the heading "General Information", Plaintiffs provided the following statement "Nevada Entertainment Industries dba Fantasy

Video Plus."

40. Under the heading "Occupancy Use Information" (type of business), Plaintiffs provided the following description:

"Mass media books and video store; novelty shop, etc."

41. On September 21, 1989, Defendant City of Henderson issued a revenue business license to Plaintiffs.

42. On or about December 5, 1989, Defendant City of Henderson re-zoned Plaintiffs' property at 1100 Boulder Highway, Henderson, NV from CC to CH. By rezoning Plaintiffs' property from CC to CH, Defendant City of Henderson determined that an adult bookstore and arcade could theoretically be operated at said location, thereby ostensibly eliminating one ground for invalidating the regulatory scheme for adult bookstores and arcades; that is, as of December 5, 1989, Defendant City of Henderson no longer purported to totally ban adult bookstores and arcades from the City of Henderson (thereby purporting to comply

with Schad v.Borough of Mount Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

43. However, although Defendant City of Henderson re-zoned Plaintiffs' property from CC to CH, Defendant City of Henderson still required a business license and a conditional use permit for the operation of an adult bookstore and motion picture arcade.

44. Defendant City of Henderson does not want any adult bookstores or motion picture arcades to be located anywhere within its territorial jurisdiction, but also does not want any court to invalidate its regulatory scheme. As a result, Defendant City of Henderson wants to create the impression that it allows such businesses when in fact it does not and does not want them.

45. On February 1, 1990, Plaintiffs opened their business and were immediately inspected by Defendant City of Henderson.

46. Defendant City of Henderson

concluded that Plaintiffs opened an adult bookstore and arcade. Because Defendant City of Henderson did not want such a business to operate anywhere within its City limits, Defendant City of Henderson took two actions to close Plaintiff's business. It introduced and, on March 13, 1990, adopted ordinance No. 1160, purporting to regulate "sexually oriented business."

47. Ordinance No. 1160 amended Title 4 of the Henderson Municipal Code by establishing Chapter 4.110. In essence, newly adopted Chapter 4.110, requires adult businesses (including Plaintiffs' business) to obtain a license; however, it would preclude a business such as Plaintiff's business from operating within 1000 feet of a place where alcoholic liquor is sold. Plaintiffs' business is within 1000 feet of a place where alcoholic liquor is sold but the ordinance creates a non conforming us for those businesses operating lawfully on March 15, 1990 (for a period of six months). Accordingly, while the adoption of Ordinance

No. 1160 reveals the obvious intent by the Defendant City of Henderson to shut down Plaintiffs' business, arguably Ordinance No.1160 has not yet affected Plaintiffs' business. There are other remedies provided by Ordinance No. 1160, and therefore the specific provisions of Ordinance No. 1160 will not be further discussed. Plaintiffs are not sure how the distance restriction will be determined and measured.

48. In addition to adopting Ordinance No. 1160, Defendant City of Henderson on March 13, 1990 initiated a proceeding to revoke Plaintiffs' business license.

49. Although Plaintiffs believe and still believe and contend that the ordinances of the City of Henderson purporting to regulate adult bookstores and arcades are facially invalid, out of an abundance of caution Plaintiffs decided to participate in an administrative proceeding provided by Defendant City of Henderson with respect to the revocation issue. The revocation hearing was conducted by the City

Council of the City of Henderson on April 10, 1990. After conducting the hearing, Defendant City of Henderson voted to revoke Plaintiffs' business license. At said hearing, Plaintiffs contended, unsuccessfully, that the regulatory scheme and the ordinances quoted above violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs objected to the revocation of their business license. The decision to revoke the license was arbitrary, invalid, and based upon incompetent and irrelevant evidence, and based upon an invalid ordinance. Plaintiffs made no material misrepresentations on their application. Had the information been presented which Defendant City of Henderson purportedly requested, it would not have been material to any valid criteria for granting or denying the license.

50. After the hearing conducted on April 10, 1990, Defendant City of Henderson purported to revoke Plaintiffs' business

license. A copy of the Decision and Order revoking the business license on April 16, 1990 is attached hereto as Exhibit 1.

51. The decision of April 16, 1990 takes effect on or about May 1, 1990.

52. Thus, as of May 1, 1990, unless this Court restrains the revocation or restrains enforcement of the ordinance, Plaintiffs will have to shut down their business. Plaintiffs contend that the business license ordinance and the conditional use permit ordinance are unconstitutional facially. Accordingly, it is probably not necessary for Plaintiffs to retain their business license. Instead, Plaintiffs have standing to challenge the facial validity of said ordinances.

53. Although unnecessary, Plaintiffs did exhaust available administrative remedies before the Henderson City Council.

54. Defendant James Goff was and is the Chief of Police of the City of Henderson. If Plaintiffs do not have a business license and/or conditional use

permit, Defendant James Goff, Chief of Police of the City of Henderson, will arrest, and/or cite Plaintiffs and their employees, in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs, accordingly, will be forced to close their business protected by the First and Fourteenth Amendments to the United States Constitution, unless this Court grants equitable relief as requested herein.

55. In addition to the Chief of Police, the Henderson Municipal Code also authorizes other City of Henderson officials to arrest and/or cite Plaintiffs. This would include the Director of Licensing, and agent and employee of Defendant City of Henderson.

56. Plaintiffs are without a legal remedy in the ordinary course of law. The threat of criminal enforcement of the Henderson Municipal Code against Plaintiffs by Defendants, is and will have a chilling affect on their First and Fourteenth

Amendment rights. They will be forced to close their business unless this Court grants a temporary restraining order, preliminary injunction, and permanent injunction.

57. Defendant City of Henderson has been since April 4, 1989, and still is, enforcing an unconstitutional regulatory scheme designed to preclude the operation of adult bookstores and motion picture arcades.

58. Plaintiffs business is located in the appropriate zone. If, in fact, it will become unlawful by virtue of Ordinance No. 1160 in six months, which Plaintiffs do not concede, then Defendant City of Henderson will also have unduly restricted the available locations wherein an adult business can be located, also in violation of the First and Fourteenth Amendments to the United States Constitution, but this particular challenge may be premature. If not, Plaintiffs are also attacking the constitutionality of Ordinance No. 1160 in this proceeding to the extent Defendants,

and each of them, attempt to enforce it.

59. Plaintiffs have been forced to retain an attorney to represent them in thisproceeding. If successful, Plaintiffs will pray for an award of attorney's fees pursuant to Title 28, United States Code, Section 1988.

60. A dispute has arisen among the parties with regard to the constitutionality of Ordinance Nos. 1112, 1120, and 1160 of the City of Henderson and actions taken by Defendant City of Henderson and threatened by Defendant City of Henderson and its Chief of Police. Accordingly, it is appropriate for this Court to render a declaratory judgment considering the constitutionality of various provisions and threatened actions and revocation proceedings of Defendants.

61. Unless this Court grants immediate relief, Plaintiffs will suffer irreparable injury in that they will be forced to close their business and be precluded from selling, renting, and exhibiting motion picture films, video tapes, and books and

magazines protected by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining Defendants, and each of them, from attempting to or from enforcing ordinances against Plaintiffs which would cause them to close their business at 1100 Boulder Highway, Henderson, NV;

2. For a temporary restraining order, preliminary injunction, permanent injunction, restraining Defendants and each of them, from revoking or enforcing the revocation of Plaintiffs' business license;

3. For declaratory judgment that Plaintiffs have the right to continue operating their business, as currently constituted, at 1100 Boulder Highway in Henderson, Nevada;

4. For declaratory judgment that

Defendant City of Henderson may not enforce its ordinances against Plaintiff's business at 1100 Boulder Highway, Henderson, Nevada;

5. For attorney's fees according to proof;

6. For such other and further relief as the court deems just and proper.

DATED: April 23, 1990

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Plaintiff

AFFIDAVIT OF DANIEL BISHOP

State of Nevada)
) SS
County of Clark)

Daniel Bishop, first being duly sworn, deposes and says:

1. I am the President of Nevada Entertainment Industries, Inc. and am also co-Plaintiff in this action. I have read the foregoing Complaint and the facts stated therein are true and correct to the best of my knowledge. If called upon as a witness, I could competently testify to such facts and I will be available for cross-examination by Defendants' counsel at the hearing on the request for temporary restraining order and at the hearing on the request for preliminary injunction.

_____

DANIEL BISHOP

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK,

STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	)	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to operate as an adult video business, the

licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately

to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issues at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of

the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAFEN

_____
CARLTON LAWRENCE

_____
DOROTHY VODENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

COPY OF QUESTIONS I & 1V IN PETITION FOR WRIT OF CERTIORARI IN NO. 92-643, AT pp. i-iii.

[Refer: page 9 of Reply Memorandum.]

Text at page 9 reads:

"A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have 'subject matter jurisdiction' on April 24, 1990, must, of necessity, follow from the 'command' of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that 'command' in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387(1941). See also Questions I & IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii, a copy of which is attached at Appendix 3 to this Brief."

Question I reads: "Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. Dist. Court has not found the "extraordinary circumstances" which the 11th Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie?"

Question IV reads: "Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Sec.1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

APPENDIX 4

COPY OF CITY OF LAS VEGAS V. NEVADA INDUSTRIES, INC., 772 P.2d 1275 (NEV. 1989).

[Reference: page 18 of Reply Memorandum.]

Text at page 18 reads:

"Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries,Inc., 772 P.2d 1275 (Nev.1989), see copy at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., No. 94-786."

[CONTENTION: The City of Las Vegas case, supra, specifically held one year earlier (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business license by deception may not obtain the judicial relief Nevada Entertainment seeks (in Questions 1-3 of its Petition for Writ of Certiorari in 94-786) in the quasi-judicial proceedings which are brought by the State to revoke its license for fraud in its business application.]

Question 1 reads: "May a city violate the first and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtianed its business license by deception?" Question 3 reads: "To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 is frivolous because the federal court below lacked subject matter jurisdiction under the 11th Amendment violation.

SUPREME COURT OF

NEVADA

CITY OF LAS VEGAS, Nevada,	CASE NO. 18491
Appellant,	OPINION.
v.	DATED: April 25, 1989
NEVADA INDUSTRIES, INC., a Nevada Corporation,	
Respondent.	

Business challenged city's revocation of its business licenses. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., issued permanent injunction and writ of mandamus prohibiting enforcement of business license ordinances against business, and city appealed. The Supreme Court, Young, C.J., held that: (1) misrepresentation in license applications that business was not sexually oriented justified revocation of licenses, and (2) ordinance provision serving as basis for imposition of fine against business was invalid.

Affirmed in part and reversed in part.

1. **Licenses:**

Falsely representing on applications for business licenses that business was not sexually oriented justified city's revocation of business licenses pursuant to municipal code, irrespective of any First Amendment interests. U.S.C.A. Const.Amend. 1.

2. **Municipal Corporations:**

While municipalities generally enjoy power to enforce their ordinances using fines, such ordinances must fix valid maximum penalty.

3. **Municipal Corporations:**

Standardless ordinance invites discriminatory enforcement.

4. **Licenses:**

Municipal Code provision authorizing imposition of penalty upon business, determined to have misrepresented its status as sexually

oriented business in application for business licenses, was invalid, as it vested city officials with unlimited discretion to establish fines and posed great risk of excessive fines. Const. Art. 1, §6.

5. Licenses:

Municipal Corporations:

Portions of penalty provision of municipal business license ordinances determined to be invalid for failing to establish valid maximum fine could be severed without defeating objectives of ordinance and, therefore, validity of remaining portions of ordinance would be sustained. Const. Art. 1, §6.

George F. Ogilvie, City Atty., Robert Yeargin and Val Steed, Deputy City Attys., Las Vegas, for appellant.

Alan B. Andrews, Las Vegas, For respondent.

OPINION

YOUNG, Chief Justice.

This action arose out of the appellant Las Vegas City Council's (Las Vegas) decision to revoke respondent Nevada Industries' business licenses. Nevada Industries operates a lounge facility with a jacuzzi and meeting rooms. A detective observed nudity and the exposure and touching of female breasts during a visit to the facility.

After an investigation and a hearing, Las Vegas revoked the business licenses because it found that Nevada Industries is a sexually oriented business, i.e. a "nude show." Consequently, it found that respondent made a misrepresentation on its application for business licenses by stating that it would not operate a sexually oriented business.[1] Moreover, Las Vegas found that Nevada Industries violated a Las Vegas zoning ordinance prohibiting the establishment of a sexually oriented business within one thousand feet of another sexually oriented business, church, school, park or playground.[2] Las Vegas also found

that Nevada Industries violated ordinances concerning the keeping of business records and failed to properly maintain its State Industrial Insurance System (SIIS) coverage. Pursuant to these findings, Las Vegas revoked Nevada Industries' business licenses and fined respondent $50,000.[3]

On Nevada Industries' motion, the district court issued a writ of mandamus and reviewed Las Vegas' actions. The district court concluded that Nevada Industries' activities enjoyed First Amendment protection because Las Vegas sought to regulate them as a "nude show." The court found the applicable ordinances unconstitutional as applied to this protected activity, and issued a permanent injunction and a writ of mandamus prohibiting their enforcement against Nevada Industries. Las Vegas appeals from the district court's judgment.

[1] Las Vegas' finding that Nevada Industries' activities constituted a nude show provided the basis for its conclusion

that Nevada Industries made misrepresentations on its application for a business license, and for its finding that Nevada Industries violated Las Vegas' zoning ordinance by operating within one thousand feet of another sexually oriented business. LVMC §19.74.020(I) addresses sexually oriented businesses, and defines "nude show" as "any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or as an attraction for business." The provision also defines adult motion picture theaters, adult bookstores, and similar establishments as sexually oriented businesses. Las Vegas correctly points out that the sucking of a woman's breast by a man, as observed by one of its detectives, constitutes "sexual conduct" under LVMC §19.74.010(A)(1) as do other actions which the detective observed.

Nevada Industries' facilities and advertising support the conclusion that it intended to operate in its present manner

(i.e. as a sexually oriented business) at the time it applied for its business license. Therefore, the record demonstrates that Nevada Industries falsely represented on its license application that it was not a sexually oriented business.

Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code.

Because Las Vegas determined that Nevada Industries' operation included a "nude show," the district court held that this case must turn upon First Amendment principles. According to the United States Supreme Court, under some circumstances,

nude dancing might be entitled to First and Fourteenth Amendment protection. California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). Thus, the district court concluded that Las Vegas' licensing procedures must meed the strict constitutional standards imposed on all statutes which impinge upon First Amendment rights. We disagree.

Las Vegas characterized the entertainment provided by Nevada Industries as "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case.

We note that under our decision in this case, Nevada Industries remains free to reapply for new business licenses. However,

should they continue to operate as a sexually oriented business, Las Vegas Municipal Code section 19.74.030 provides a basis for denying their licenses.

Accordingly, we reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business licenses. However, we affirm the district court insofar as it enjoined the imposition of Las Vegas' $50,000 fine upon respondent.

[2-5] According to Las Vegas Municipal Code section 6.88.120, after a hearing on a dispute, the board of commissioners shall render a decision on the merits, including "the penalty to be imposed, if any." After concluding that Nevada Industries violated Las Vegas' business licensing ordinances, the board of commissioners fined respondents $50,000.

Generally, municipalities enjoy the power to enforce their ordinances using fines. Commonwealth v. Cabell, 199

Pa.Super. 513, 185 A.2d 611, 616 (1962). However, the ordinance must fix a valid maximum penalty. Verona v. Shalit, 96 N.J.Super. 20, 232 A.2d 431, 433 (App.Div.1967). Because the penalty provision of section 6.88.120 fails to provide any limitation on the fines imposed, that clause is void. Id.

Municipal ordinances must not be oppressive. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 340 (1956). In its present form, section 66.88.120 is invalid because it vests Las Vegas officials with unlimited discretion to establish fines. A standardless ordinance invites discriminatory enforcement. Baer v. City of Wauwatosa, 716 F.2d 1117, 1124 (7th Cir.1983). Because of the great risk of excessive fines resulting from enforcement of the penalty provision, it cannot stand.[4] Nev. Const. art. 1, §6.

When invalid provisions of a municipal ordinance are severable without defeating the objectives of the ordinance, we sustain

and give effect to valid portions of the ordinance.[5] City of Portland v. Dollarhide, 71 Or.App. 289, 692 P.2d 162, 167 (1984). Accordingly, we sustain the validity of the remaining portions of section 6.88.120.

Therefore, we affirm the judgment of the district court insofar as it enjoins the imposition of Las Vegas' fine on Nevada Industries, and reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business license.[6]

STEFFEN, SPRINGER and MOWBRAY, JJ., concur.

1/ Las Vegas Municipal Code §6.02.330 provides in part:

> 6.02.330 **Disciplinary action-Good cause designated.** The licensee may be subject to disciplinary action by the Board of Commissioners for good cause, which may include, but is not limited to:
>
> (A) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information required in the application;

(B) The licensee or any of its principals fails to satisfy any qualification or requirement imposed by this Code, or other local, State or Federal Law or regulation pertaining to the particular license or approval for suitability sought or held;

. . . .

(F) The licensee or any of its principals has committed acts which would constitute a crime involving moral turpitude, or involving any Federal, State or local law or regulation relating to the same or a similar business;

(G) When substantial information exists which tends to show that the licensee or any of its principals is dishonest or corrupt;

. . . .

(I) The actual business activity constitutes a public or private nuisance, or will be or is conducted in an unlawful, illegal or improper manner;

. . . .

2/ In Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a zoning ordinance similar to that implemented by Las Vegas in this case. The Court noted that the mere fact that commercial exploitation of material arguably protected by the First Amendment is subject to zoning and other licensing criteria is an insufficient reason for invalidating these ordinances. Id. at 62, 96 S.Ct. at 2448. Moreover, we must give great respect to Las Vegas' interest in preserving the quality of urban life and to

2/ Cont.
its need to experiment with solutions to difficult problems. Id. at 71, 96 S.Ct. at 2452-53. Thus, we find that the zoning ordinance implicated in this case is constitutional.

3/ The City imposed the fine pursuant to Las Vegas Municipal Code §6.88.120 which provides that:

> 6.88.120 Decision by Board. After the hearing of a contested matter, the Board of Commissioners shall render a decision on the merits which shall include findings of fact and conclusions of law and the penalty to be imposed, if any, and shall thereafter make and enter its order in its minutes in conformity to such decision. The decision of the Board shall be served on the parties personally or shall be sent to them by registered or certified mail. The decision shall become and remain effective upon such service unless the Board shall otherwise order.

4/ According to NRS 193.170, whenever a statute prohibits the performance of any act but fails to impose a penalty for the violation thereof, commission of the act shall be a misdemeanor.

5/ We note that the vague penalties referred to in section 6.88.120 can easily be clarified by amendment.

6/ The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

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No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

I. THE RECENT "CONDITIONAL USE" ZONING DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN 11126 BALTIMORE BLVD., INC. v. PRINCE GEORGE'S COUNTY, MD., 32 F.3d 109 (AUG. 12, 1994) ATTESTS TO THE CORRECTNESS OF THE CITY'S ACTIONS ON BEHALF OF THE SOVEREIGN STATE OF NEVADA IN DEMANDING ABSTENTION AS A "SOVEREIGN RIGHT" UNDER THE ELEVENTH AMENDMENT..... 2

II. NEW MATTER PRESENTED..... 5

III. THE CONFLICT WITHIN THE NINTH CIRCUIT (38 JUDGES) IS A MAGNIFICATION OF THE "CONFLICT BETWEEN CIRCUITS," DESCRIBED IN RULE 10.1(A) AS "COMMON GROUNDS" FOR GRANTING CERTIORARI..... 14

CONCLUSION..... 20

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994)..... 18

Benavidez v. Eu, 34 F. 3d 825 (1994)..... 16, 17, 18

Cotlow et al. v. Emison et al., __U.S. __, 116 L.Ed.2d 388 (1992)..... 19

D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983)..... 12

Dubinka v. Judges of the Superior Court, 23 F.3d 222 (CA 9, 1994)..... 12, 15, 20

Emison v. Grove, 782 F.Supp. 427 (D.Minn. 1992)..... 19

Federal Express Corp. v. Tennessee Public Service Commission, et., 693 F.Supp. 598 (M.D. Tenn 1988)..... 7

Federal Express Corp. v. Tennessee Public Service Commission, et., 878 F.2d 381 (CA 6, 1989)..... 7

Federal Express Corp. v. Tennessee Public Service Commission, et., 878 F.2d 1483 (CA 6, 1989)..... 7

Federal Express Corp. v. Tennessee Public Service Commission, et., 738 F.Supp. 1140 (M.D. Tenn., 1990)..... 7

Federal Express Corp. v. Tennessee Public Service Commission, et., 925 F.2d 962 (CA 6, 1991)..... 7

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Growe v. Emison,
507 U.S. ___, 122 L.Ed.2d 388 (1993)..... 19

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975)..... 1, 2, 6, 7, 8, 12, 15, 16, 17, 19

Members of Cal. Democratic Cong. Delegation v. Eu,
790 F.Supp. 925
(N.D.Cal. 1992).....15, 16, 17, 18

Nevada Entertainment Industries, Inc. v. City of Henderson,
8 F.3d 1348 (1993)..... 5, 11

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.,
477 U.S. 619 (1986).....1, 2, 6, 8, 11, 13, 19

11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,
886 F.2d 1415 (CA 4, 1989)..... 2, 4

11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,
828 F.Supp. 370 (1992)..... 4

11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,
32 F.3d 109 (1994)..... 2, 4

O'Neill v. City of Philadelphia,
32 F.3d 725 (CA 3, 1994)..... 11, 12, 14, 20

Pennzoil Co. V. Texaco, inc.,
481 U.S. 1 (1987)..... 9

U.S. v. 37 Photographs,
402 U.S. 363 (1971)..... 3

Watson v. Buck,
313 U.S. 367 (1941)..... 3, 5, 19

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

World Famous Drinking Emporium
v. City of Tempe,
820 F.2d 1079 (CA 9, 1987)...7, 15, 16, 17, 20

Younger v. Harris,
401 U.S. 37 (1971)..... 15, 18

CONSTITUTIONAL PROVISIONS

United States Constitution
Article
III..... 1, 12

Amendments
Eleventh..... 1, 2, 5, 6, 7, 8,
9, 12, 13, 15, 16, 17, 18, 19

FEDERAL RULES

U.S. Supreme Court Rules
Rule 15.7..... 1
Rule 10.1(A)..... 14, 15

No. 94-662

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PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Petitioners, City of Henderson, a Nevada Municipal Corporation, and James Goff, its Chief of Police (hereinafter "City" and "Henderson"), hereby submit a supplemental brief pursuant to Court Rule 15.7 for the purpose of calling this Court's attention to important intervening matters which have occurred subsequent to the October 11, 1994 filing of this petition for writ of certiorari (hereinafter "Henderson Petition in 94-662").

The City contends that the exercise of Article III jurisdiction as to the federal Complaint herein is barred for two separate and distinct reasons: (1) the Eleventh Amendment to the U.S. Constitution so commands,[1/] and (2) this Court's judgment and opinion in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton

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1/ See Henderson Petition in 94-662 at pages 54-55 for a statement of the "first principle" perquisites (rights) flowing from state sovereignty and the Eleventh Amendment command: "The judicial power of the U.S. shall not extend to any suit in (Footnote Continued)

Christian Schools, Inc., 477 U.S. 619 (1986) require abstention (as a corollary right arising out of the Eleventh Amendment).

I

THE RECENT "CONDITIONAL USE" ZONING DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN 11126 BALTIMORE BLVD., INC. V. PRINCE GEORGE'S COUNTY, MD., 32 F3d 109 (AUG. 12, 1994) ATTESTS TO THE CORRECTNESS OF THE CITY'S ACTIONS ON BEHALF OF THE SOVEREIGN STATE OF NEVADA IN DEMANDING ABSTENTION AS A "SOVEREIGN RIGHT" UNDER THE ELEVENTH AMENDMENT.

Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh

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(Footnote Continued)
law or equity...", a copy of which is attached at Appendix B-4 to this Brief.

Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See Henderson Petition for Writ of Certiorari in No. 90-1771 at pp. 51-61; Petition for Writ of Certiorari in No. 92-643 at pp. 7-12; Petition for Writ of Mandamus in No. 93-1969 at pp. 11-16, and Supplemental Brief at pp. 9-20; and Petition for Writ of Certiorari in No. 94-662 at pp. 51-64 [a copy of which pp. are attached at Appendix B-1, B-2, B-3, and B-4 to this supplemental brief]. Compare U.S. v. 37 Photographs, 402 U.S. 363 (1971).

During the past 4 years, the City has articulated its reasoning to this Court not only in general terms, but also with reference to the specific example the City had in mind, in its first petition for writ of certiorari in No. 90-1771 at pages 51-61, (see Appendix B-1 at pages 53-54 to this brief) in relation

to the opinion in 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 (CA 4 1989) - a lawsuit that was filed 8-1/2 years ago (May 1986).

The day before this petition in 94-662 was filed, the most recent Fourth Circuit Court of Appeals judgment in 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., was reported in the advance sheets for October 10, 1994, as 32 F.3d 109 (CA 4, August 12, 1994). That decision reversed the judgment and opinion of U.S. District Judge Frank A. Kaufman below in 828 F.Supp. 370 (July 27, 1992). The "arbitrary" nature of the Fourth Circuit's opinion which "says it all" (i.e. at page 113: U.S. District Court opinion states: "if six months is reasonable, then five months must be also; and, at 117, Fourth Circuit opinion states: "no it isn't"), attests: (1) to the correctness: of the City's determination that the interpretation of the "conditional use" zoning concept in Nevada should be given by the Nevada State Judges and not by members of the federal judiciary

[Watson v. Buck, 313 U.S. 367 (1941)]; and (2) that City of Henderson v. Nevada Entertainment Industries, Inc. et al., is a proper case for the City, acting for the State of Nevada, to pursue a constitutional challenge and a Judgment of this High Court which will attest to the fact that the State of Nevada does possess a "sovereign right" as a "Sovereign State" upon demand, to have newly enacted legislation interpreted by the State Courts, under the Eleventh Amendment. (See footnote 1 on page 2, supra.)

II

NEW MATTER PRESENTED

The refusal of the Ninth Circuit panel [Browning, Canby, Jr., and Kelleher] in its November 2, 1993 opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993) to address Henderson's claim to a first principle "sovereign right"[2/] under the Eleventh Amendment as a "Sovereign State," which was posed on the City's cross-appeal, and the

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2/ That is, whether the U.S. District (Footnote Continued)

subsequent withdrawal by that Court of its November 2, 1993 opinion on April 7, 1994, which addressed only the subsidiary issue relating to Henderson's claim to a corollary right[3] has, like the "call of the siren," "lured" Nevada Entertainment Industries, Inc., into actively pursuing that panel's unexplained refusal to apply the U.S. Supreme Court's mandate in Huffman and Dayton which it previously had, in a formal published opinion in 8 F.3d 1348, found to be binding rules of law.

(Footnote Continued)
Court was barred from assuming jurisdiction of the federal complaint, because its Article III power is limited by the provisions of the Eleventh Amendment, as here, where the State's right to license businesses, and punish fraud may not (wrongfully) be interfered with.

3/ That is, whether the federal complaint must be dismissed because of this Court's judgment and opinion known as the Huffman abstention doctrine, as extended by this Court's holding in Ohio Civil Rights Commission v. Dayton Christian Schools, supra, which rights are predicated upon the assumption and conclusion that the assertion of such (concurrent) jurisdiction may or will interfere with the Sovereign's Right under the Eleventh Amendment.

At a bare minimum, the Huffman precedent, where applicable, customarily evokes a ruling that the federal complaint was barred and must be dismissed, as was the Ninth Circuit's final judgment on November 2, 1993 in the Henderson cross-appeal below. Almost without exception, the foundational Eleventh Amendment question is rarely discussed, and in this case, was deliberately avoided by the Court of Appeals. See, however, the exception in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), at 1084, discussed at Point III, on page 14, infra. See, also, the scholarly observations of U.S. District Judge Wiseman in a series of five opinions over a three year period in Federal Express Corp. v. Tennessee Public Service Commission, etc., 693 F.Supp. 598 (M.D. Tenn., 1988); 878 F.2d 381 (CA 6, 1989); 878 F.2d 1483 (CA 6, 1989); 738 F.Supp. 1140 (M.D. Tenn., 1990); and 925 F.2d 962 (CA 6, 1991).

In his petition for rehearing, attorney Diamond had argued that the converse proposition must be true: i.e. that (1) the silence of the Ninth Circuit Court on the Eleventh Amendment "jurisdictional" issue, and (2) the withdrawal of the November 2, 1993 Judgment applying Huffman abstention was a sub silentio holding that the federal Court: (a) did have subject matter jurisdiction to hear the complaint, and (b) was not restricted by the Huffman and Dayton opinions.[4/]

In his Petition for Rehearing, attorney Diamond also argued, unsuccessfully, that the Court should hear the "facial" attack which Nevada Entertainment's

---

4/ To come to such a conclusion under the assumption that, for some unexplained reason, Huffman does not apply, is one thing; for the Ninth Circuit to reach the same conclusion regarding the Eleventh Amendment provision on the record below -- the federal Court's wrongful interference herein, with the Sovereign Right of the State of Nevada to utilize the State's judicial system to adjudicate a state initiated license revocation enforcement proceeding [revoking a municipal license

(Footnote Continued)

federal complaint also alleged, and which was not before the quasi-judicial fact finding body, except as it was pleaded by Nevada

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(Footnote Continued)
based upon fraudulent statements made by the license applicant in its license application] -- is incomprehensible.

Once the State's judicial power has been invoked (through "on-going" proceedings subject to judicial review):

(1) the federal court cannot exercise jurisdiction over the same subject matter without wresting control from the state by enjoining the state proceedings (as was done in this case). This, in effect, makes the State judicial system a "defendant" in the federal action -- a state's Sovereign Right to be free from such federal intrusion is the very reason the Eleventh Amendment was adopted!

(2) the federal courts cannot Constitutionally interfere with the State's on-going adjudication, unless the State's judicial system is shown to be "inadequate," and "a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." [Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), at 15]; and the federal plaintiff has the burden of proof in federal court of establishing that the state judicial system will violate federal constitutional law.

(3) If the federal complaint contains no recited facts, which if proven, would show that the state judicial system is "inadequate," the federal plaintiff has not only failed to state a cause of action -- the federal plaintiff has also failed to file a complaint which invokes federal jurisdiction, and the federal complaint must be dismissed.

Entertainment as an affirmative defense in his answer to the City's complaint. Having failed with that argument, Nevada Entertainment, nevertheless, did on October 7, 1994, file a frivolous Petition for Writ of Certiorari in 94-786 in support of that contention (hereinafter "Nevada Entertainment Petition in 94-786"), in which Nevada Entertainment has frivolously misrepresented the facts and record below.

Henderson's Respondents' Brief in Opposition to Nevada Entertainment's Petition in 94-786 (containing a copy of the Reply Brief in 94-662 filed on November 28, 1994 as Appendix A thereto), filed in 94-786 on December 1, 1994 (see copy at Appendix "A" to this supplemental brief in 94-662) clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990;

(2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question." For a case containing a fact situation where the quasi-judicial proceedings had conclusively been terminated, see, the example described in O'Neill v. City of Philadelphia, 32 F.3d 725, at 746 (CA 3, Aug. 5, 1994), petition for writ of certiorari filed in this Court on November 30, 1994, as 94-982);

The City contends that Nevada Entertainment's attempt to proffer the statement of facts in the petition for writ of certiorari as such to this Court, in the face of the record which indisputably shows the exact contrary, makes Nevada Entertainment's filing in Petition 94-687 a frivolous filing which is subject to sanctions.

Further, as Henderson's Respondents'

Brief in Opposition (filed on December 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the Eleventh Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9, April 8, 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See Supplemental Brief to Petition for Writ of Mandamus in Case 93-1969, at pages 19-20, and Point I(C) of the Henderson's Petition in 94-662 at pages 61-64 [copies of which are attached at Appendices B-3 and B-4 to this supplemental brief].

The final judgment in O'Neill v. City of Philadelphia, 32 F.3d 725 (Aug. 5, 1994), petition for writ of certiorari

filed in this Court on November 30, 1994, as 94-982, contains rulings on several quasi-judicial proceedings, some in which the state quasi-judicial hearing was "pending" and thus was a "closed question" which has been decided in Dayton Christian Schools, and others in which the state hearing had been terminated and thus was an "open question." See page 746. The majority opinion of Judges Garth and Roth, and the dissenting opinion of Judge Lewis in the O'Neill case are realistic examples of the conflict which exists on the Ninth Circuit of 38 justices -- yet neither opinion addresses the fundamental question relating to the "first principle," Eleventh Amendment "sovereign right" of each State, as a Sovereign, herein claimed by the State of Nevada. The City respectfully submits that, to restore balance in such abstention litigation (involving the Eleventh Amendment), the concepts urged in the City's petition must be reconsidered. This Court should, therefore, grant the

petition in both the City of Philadelphia and the City of Henderson cases and set those cases for briefing and oral argument in tandem on the Jurisdictional Questions Presented in Henderson's Petition in 94-662 and in such other cases.

Because Nevada Entertainment's Petition in 94-786 is inextricably related to Henderson's Petition in 94-662, Henderson requests this Court to consider the merits of both petitions and the Petition in O'Neill 94-982, also, at the same conference; and to also consider in Case 94-662 the two Questions which are presented at pages i, ii, iii, and iv of the City of Henderson Respondents' Brief in Opposition in 94-786 as subsidiary questions to Questions I, II, III, IV and V previously raised in Henderson's Petition in 94-662.

III

THE CONFLICT WITHIN THE NINTH CIRCUIT (38 JUDGES) IS A MAGNIFICATION OF THE "CONFLICT BETWEEN CIRCUITS," DESCRIBED IN RULE 10.1(A) AS "COMMON GROUNDS" FOR GRANTING CERTIORARI.

One of the common grounds for

granting certiorari is a conflict between circuits (see Rule 10.1(a) of the U.S. Supreme Court Rules). The present problem in the Ninth Circuit is a magnification of that ground. Counsel of Record submits that of the 38 judges on the Ninth Circuit (see attached list at Appendix C), only those participating in Dubinka have demonstrated a clear understanding as to the "jurisdictional" (subject matter jurisdiction) meaning of Younger-Huffman abstention, and its interaction with the Eleventh Amendment. Argument in relation to the Eleventh Amendment, as in this case, is shunned as thought it were a plague, rather than a revered constitutional right belonging to each Sovereign State. See, for example, the divergent view of Circuit Judge Tang, expressed in World Famous Drinking Emporium, Inc. v. City of Tempe, as viewed in the light of Circuit Judge Tang's dissent in Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 at 935 (N.D. Cal. 1992), reversed in

Benavidez v. Eu, 34 F.3d 825 (Sept. 1, 1994), neither of which opinions has seen the need to address the specific Eleventh Amendment Constitutional issue raised by Judge Anthony M. Kennedy in the City of Tempe concurring opinion.

U.S. Circuit Judge Tang's vociferous dissent, in the three-judge court opinion in 790 F.Supp. 925, at 933-937, presents the "key" to the Ninth Circuit's problem. The Huffman test, where applicable, requires a finding of "extraordinary circumstances" before the federal court can acquire subject matter jurisdiction. Even where Huffman is clearly applicable, Judge Tang continues to apply the same test which controls other abstention doctrines, which requires the "converse" consideration - a finding of "extraordinary circumstances" before the Court can abstain. If Judge Tang's dissenting opinion in Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 at 935 (N.D.Cal. 1992) is read in tandem with his majority opinion

in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), it can be seen that Judge Kennedy is differing with him and saying that, in Huffman abstention cases, only the Huffman test is to be applied. Thus far, Judge Tang's approach which pays scant attention to "State Sovereignty" concerns has eclipsed Judge Kennedy's "logical" Eleventh Amendment analysis. Most of the Ninth Circuit Judges ignore the Eleventh Amendment commandments that "the judicial power of the U.S. shall not be construed to extend to any suit in law or equity..." (our emphasis) in their analyses, which is resulting in skewed decisions.

The advance sheets, reporting the Benavidez case, were delivered by mail on Saturday, November 14, 1994. Based upon Eleventh Amendment considerations, the City of Henderson contends that U.S. District Court Judge Legge's opinion in Member of the California Democratic Congressional Delegation v. Eu, for the 3-judge court in 790 F.Supp.

925 (Mar. 3, 1992), correctly reflects Eleventh Amendment "concerns" that "the Judicial Power of the U.S. shall not be construed to extend to any suit in law or equity...." Compare, Judge Poole's flawed opinion for the Court in Benavidez v. Eu, 34 F.3d 825, at 829 (Sept. 1, 1994), that Younger abstention is not jurisdictional, with his opinion to the contrary in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994), the latter of which requires a dismissal of the Complaint under Younger, without reference to the realistic fact that such dismissal is mandated by the Eleventh Amendment commandment quoted above, "The Judicial Power of the U.S. shall not be construed to extend to any suit in law or equity...." and is predicated on State Sovereignty concerns. Circuit Judge Tang's dissent in the three-judge court below in 790 F.Supp. 925, at 933-937, and U.S. Court of Appeals Judge Poole's opinion upon appeal in Benavidez re "subject matter jurisdiction"

should be reexamined by this Court during oral argument on the question of "subject matter jurisdiction" in Watson v. Buck, Huffman, Dayton, and other reported abstention cases which, by their very nature, involve Eleventh Amendment principles and concerns. See, for example, the related problems in Emison v. Grove, 782 F.Supp. 427 (D.Minn. 1992); Cotlow et al. v. Emison et al., No. 91-1084, ___U.S.___, 116 L.Ed.2d 764 (1992), and this Court's unanimous decision in Growe v. Emison, 507 U.S. ___, 122 L.Ed.2d 388 (1993).

When a state agency makes its judgment as to whether it should file an appeal in the Ninth Circuit on the abstention issue, the decision making authority is faced with the prospect that the panel of judges which will be assigned to hear that particular case will be chosen from a list of 3-judge panels, of geometric proportions, derived from permutations and combinations of those 38 judges. If the assigned panel of judges in a given case

were to consist of Judges Cynthia Hall, Betty Binns Fletcher, and Justice Kennedy, one would have a "sure-winner." See Dubinka, supra, and World Famous Drinking Emporium, supra. If the panel were Circuit Judges Tang, Ferguson, and Browning, one would have a "sure-loser" -- on the same facts. The end result is a game of "Russian roulette," with the very likely prospect of an award of attorney fees, which can be quite substantial, to the "prevailing party plaintiff." The odds are stacked in the wrong direction and bad decisions are not being appealed for that reason.

CONCLUSION

This Court should grant the petition for a writ of certiorari in the O'Neill petition in 94-982, and in the Henderson petition in 94-662, and set both cases for argument in tandem, on the questions raised in both of those cases.

Dated: December 14, 1994

James J. Clancy

APPENDIX A

HENDERSON'S RESPONDENTS' BRIEF IN OPPOSITION IN CASE NO. 94-786, WITH COPY OF PETITIONERS' REPLY MEMORANDUM IN NO. 94-662 ATTACHED AS APPENDIX A THERETO.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 10-11.]

Text reads:

" Henderson's Respondents' Brief in Opposition to Nevada Entertainment's Petition in 94-786 (containing a copy of the Reply Brief in 94-662 filed on November 28, 1994 as Appendix A thereto), filed in 94-786 on December 1, 1994 (see copy at Appendix "A" to this supplemental brief in 94-662) clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990; (2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question."

BEST AVAILABLE COPY

No. 94-786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC.,
A NEVADA CORPORATION AND DANIEL BISHOP,

PETITIONERS

v.

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION,
JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

RESPONDENTS

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY RESPONDENT CITY OF HENDERSON ET. AL., IN RELATION TO ELEVENTH AMENDMENT INFIRMITIES IN LIEU OF PETITIONER NEVADA ENTERTAINMENT'S QUESTIONS 1, 2, AND 3.

I

Whether the filing of the federal civil rights complaint by Nevada Entertainment Enterprises, Inc., a Nevada Corp. and citizen of the State of Nevada, in the U.S. District Court for the District of Nevada on April 24, 1990, while the Nevada State License Revocation Proceedings were still pending before the City Council of Henderson sitting as a Nevada Quasi-Judicial Board of Fact Finders, in which a quasi-judicial order of business license revocation by the Henderson City Council had been voluntarily stayed for 10 days by the City Council from its issuance on April 16, 1990 to May 1, 1990, for the purpose of permitting Nevada Enterprise to appeal such license revocation order to the Nevada District Court, under the State of

Nevada procedure, and Nevada Enterprises' procurement and execution of a compulsory federal temporary restraining order, and compulsory preliminary injunctions of the U.S. District Court and the U.S. Court of Appeals, which extended the City Council's stay order indefinitely and interfered with the State of Nevada's Administration of the judicial procedures; constituted a "patent" violation of the Eleventh Amendment to the Federal Constitution by Nevada Entertainment which, per force, ousted the federal courts of subject matter jurisdiction and required the U.S. District Court and Court of Appeal to abstain and dismiss such Complaint in the U.S. District Court under this Court's binding precedents in Huffman v. Pursue Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools Inc., 477 U.S. 619 (1986).

II

Whether the City of Henderson was denied due process of law by the Ninth Circuit Court of Appeals' (Browning, Canby, and Kelleher) Order of April 7, 1994 withdrawing its opinion in 8 F3, 1348, without cause and without explanation, and refusal of that Court to apply (as the law of the case) the rulings of this Court in Huffman v. Pursue Ltd., supra, and Ohio Civil Rights Commission v. Dayton Christian School, Inc., supra, which the Ninth Circuit on November 2, 1993 had held to be binding precedent in Nevada Entertainment Industries Inc. v. City of Henderson, 8 F3, 1348, and which required the federal court to dismiss the federal complaint, but which refused to rule upon the City's additional claim that the dismissal was predicated upon an Eleventh Amendment violation; and for lack of subject matter jurisdiction, and where such refusal, and subsequent withdrawal has caused Nevada Entertainment

Inc., thereafter, in its Response in No. 662 and its Petition in No. 786, to change its prior arguments, and to file this petition for writ of certiorari under a (different) rule of law which had not, theretofore, been available to it under the Huffman v. Pursue, and Dayton Christrian School rulings which required a dismissal of the federal civil complaint for violation of the Eleventh Amendment, see Petition for Writ of Certiorari in 94-662 at pages 32 and 33, and 34.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
THE NEVADA ENTERTAINMENT STATEMENT OF FACTS IS EGREGIOUSLY IN ERROR...	2
STATEMENT OF FACTS.....	5
THE ELEVENTH AMENDMENT FORBIDS THE FILING OF NEVADA ENTERTAINMENT'S FEDERAL COMPLAINT.....	38
RESPONDENTS' OBJECTIONS TO PETITIONERS QUESTIONS 1, 2, AND 3.....	44
STATEMENT OF THE CASE.....	48
CONCLUSION.....	53

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Anderson v. Haless,
459 U.S. 412 (1982).....50

D.C. Court of Appeals v. Feldman,
460 U.S. 462 (1983.....26

Dubinka v. Judges of the Supreme Court,
23 F.3d 218 (CA 9,
April 8, 1994).....33, 34

England v. Louisiana State Board
of Medical Examiners,
375 U.S. 411 (19.....16

Hicks v. Miranda,
422 U.S. 332 (1973).....15, 24

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975).....13, 15, 17, 21,
26, 28, 30, 32, 33, 36, 45,
48, 51, 52, 53

Kokkonnen v. Guardian Life Ins. Co.
of America,
54 CCH S.Ct. Bull. B1724
(CA 9, May 16, 1994).....37

New York Football Giants, Inc. v.
L.A. Chargers Football Club, Inc.,
291 F.2d 471 (1961).....14

Ohio Bureau of Employment Services
v. Hodory,
431 U.S. 471 (1977).....16

Ohio Civil Rights Commission v.
Dayton Christian Schools, Inc.
477 U.S. 619 (1986).....44, 53

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

11126 Baltimore Blvd. v. Prince George's County., Md.,
886 F.2d 1414.....49

11126 Baltimore Blvd. v. Prince George's County, Md.,
32 F.3d 109
(1994).....49

Watson v. Buck,
313 U.S. 367 (1941).....28, 48, 49

Welch v. State Dept. of Highway and Public Transportation et al.,
483 U.S. 468.....40

Wiener v. County of San Diego,
23 F.3d 263 (CA 9,
April 5, 1994).....33, 34

World Famous Drinking Emporium, Inc. v. City of Tempe,
820 F.2d 1079 (CA 9, 1987).....21, 31

Younger v. Harris
401 U.S. 37 (1971).....13, 35, 48

STATE CASES

City of Las Vegas v. Nevada Industries,
772 P.2d 1275.....18, 44, 45, 46, 52

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
First.....47
Eleventh.....13, 28, 31, 38, 39, 40, 41, 45, 47, 48, 51
Fourteenth.....47

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

28 U.S.C.
Section 1292(b).....25
Section 1651(a).....21
Section 2101(e).....20
Section 2101(f).....20

42 U.S.C.
Section 1983.....11, 13

Section 1988.....54

FEDERAL RULES

U.S. Supreme Court Rules
Rule 13.1.....21
Rule 22.5.....20
Rule 23.....20
Rule 23.1.....21

Federal Rules of Civil Procedure
Rule 11.....54
Rule 62(c).....28

Federal Rules of Appellate Procedure
Rule 5.....25
Rule 41(b).....38

Rules of the Ninth Circuit
Rule 27-3.....30
Rule 36-2.....31

STATE LAW

Henderson Municipal Code
Section 4.06.160.....12

TABLE OF AUTHORITIES

PAGE

TEXTS

"Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over Suits against States," 106 L.Ed.2d 660.....41

Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, (7th Ed.).....50

In the Supreme Court
of the
United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP
Petitioners,
vs.
CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents City of Henderson, a Nevada Municipal corporation, and JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, respectfully request that this Court summarily deny Nevada Entertainment's petition for writ of certiorari, seeking review of the Ninth Circuit opinion in this case which is unreported, as a frivolous petition,

without any merit whatsoever, or consolidate this Petition with the City of Henderson's Petition in Case No. 662 and set both Petitions for argument and decision on the questions raised in Case No. 662.

THE NEVADA ENTERTAINMENT STATEMENT OF FACTS IS EGREGIOUSLY IN ERROR.

The petitioners' NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP (hereinafter "Nevada Entertainment) statement of the facts, which appears at pages 4-8 under the heading "Statement of the Case", is egregiously in error, and is fatally flawed in relation to Nevada Entertainment's present election, after 4 years of litigation, to "change its tune" and now argue for the first time, in the face of uncontrovertible facts to the contrary, that it pleaded an "independent action in the federal court which has raised a serious challenge to the

constitutionality of the ordinances themselves. See page 5 at lines 6-15 reading:

> "The action was filed after the City of Henderson had decided to revoke Nevada Entertainment's business license on the ground that it fraudulently obtained a business license from the City by misrepresenting to the City the nature of the business it intended to operate in the City of Henderson. Instead of seeking judicial review in the Nevada State Court of the revocation order Nevada Entertainment filed the instant independent action in the federal court challenging the constitutionality of the ordinances themselves." (Our emphasis).

The above statements of fact at page 5 and others at pages 4-8 are totally false because such language has been carefully crafted and purposely omits other essential "facts' which are necessary for a proper understanding of their full and truthful meaning and significance, and should be totally disregarded for the special purpose intended by Nevada Entertainment in their petition in No. 786. (As a substitute therefore, the City of Henderson has setforth hereinafter at

pages 5-38 the Statement of Facts in the City's Petition for Writ of Certiorari in Case No. 94-662 at pp. 3-36). The "irregularity", described above, also appears in Nevada Entertainments' Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in City of Henderson, a Nevada Municipal Corporation, et al. v. Nevada Entertainment Industries, Inc., a Nevada corporation and Daniel Bishop, in the Supreme Court of the United States, October Term 1994, No. 94-662, Docketed on October 11, 1994. There, the Petition of the City of Henderson dealt with said "irregularity" in a comprehensive manner in its Reply Brief. The Reply Brief in No. 94-662 is equally relevant to this Petition in 94-786. A copy thereof is attached at Appendix A to "Respondents Brief in Opposition" herein in No. 94-786.

The Statement of Facts in the City's Petition includes the City's use of the "clean hands" equity doctrine, res

judicata, collateral estoppel and other such facts which are "selectively omitted" in the Nevada Entertainment petition.

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zongin Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under State law and the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses

which required application for a conditional use permit (as to which Nevada Entertainment, Inc. has never filed an application).

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a revenue based business license, indicating that their intended use of the property would be that of an "adult business." In applying for the business license, Federal Plaintiffs learned of the new provisions for sexually oriented adult businesses, including the need to apply for a zone change or variance, and a request for a conditional use permit, to permit them to operate such a business at their specific location.

Federal plaintiffs were informed by

the City that, under the applicable zoning provisions, the site they had rented was not then zoned for "adult use," and that if they wanted to operate an "adult use," they would have to request a variance or change in zoning.

Federal plaintiffs asked City officials if they could immediately open for business if they decided to operate a different use, such as a general video store (which was a separate and distinct use from an adult business under the new zoning code). They were told that their rented site was zoned for use as a general video store, but since this was a change in the described use in their business application form, they could qualify for issuance of a business under that use only if they resubmitted their business license application and indicated their intention to open a general video store.

Federal plaintiffs did not apply for a zone change or variance or conditional use permit. Instead, they submitted an

amended application for a business license, in which they intentionally and with knowledge of the substantive difference between the two categories, applied for permission to operate a business fraudulently described as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business."

In September of 1989, federal plaintiffs, on the basis of this intentional misrepresentation, were issued a revenue-based business license to operate a general video store on the Premises located at 1100 Boulder Highway, Henderson, Nevada, under the name "Fantasy Video Plus."

The operation opened for business in or about February 1990. Although Federal Plaintiffs had represented to the City during the business license application process that the business use for "Fantasy Video Plus" would be that of a general video store, they immediately operated the

same as an "Adult Business." Federal plaintiffs admit in this action and have stipulated that since opening for business they have used the Premises for the continuous operation of a different business use, i.e. that of an Adult Business.

An Adult Business is a business use separate and distinct from a general video store. In the course of making application for their business license, federal plaintiffs had been made aware that there was a substantive difference between the two uses (general video vs. Adult Business), and had affirmatively assured the Community and Planning Departments' inspecting official that the business was not an "Adult Business" but was rather a general video business. See paragraph 6 of Licensees' Answer to Complaint, filed before the Henderson City Council in In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

When the licensees' deception came to the attention of the City inspectors, state law enforcement action was commenced through the filing of a complaint and the initiation of administrative license revocation proceedings against Federal Plaintiffs, which sought the revocation of the business license issued to the operation "Fantasy Video Plus," on the grounds that licensees had deliberately made fraudulent and material misrepresentations in their business license application in order to secure immediate issuance of the license. This state administrative enforcement action came before the City Council for hearing on April 10, 1990.

At the state license revocation proceedings, it was determined that

federal plaintiffs' misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues they sought to relitigate in their federal civil rights complaint under 42 U.S.C. Section 1983. (See Federal Plaintiffs' Answer to the City of Henderson Summons and Complaint before the City Council in license revocation proceedings, appearing as Appendix 1 in the Petition for Writ of Certiorari in Case No. 92-643.

The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

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The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by the municipal licensing ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") 4.06.160]. See copy of the City Council's findings of fact, conclusions of law, and order attached at Appendix 2 to the Petition for Writ of Certiorari in Case No. 92-643. Federal Plaintiffs incorrectly asserted at page 14 of their brief on appeal that the City "stayed its decision" for ten days. The correct statement is that the City, by its order dated April 16, 1989, revoked licensees' business license, but stayed enforcement action on the revocation, for a period of ten days, in order to allow the licensees an immediate and unfettered opportunity to have this revocation action reviewed by the state court, as provided by state law and municipal ordinance.

Instead of appealing the City

Council's (quasi-judicial) administrative factfinding and license revocation in state court, licensees filed this action in federal court as a defense to the City's enforcement action (which was pending because of the stay issued and the existence of a statutory right to appeal the City's action within the state judicial system), thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

It is important to note at the outset of these Statement of Facts that the gravamen of the 42 U.S.C. Section 1983 complaint is its federal interference with state judicial procedures, (not with mere City functions). The City, in defending against the civil rights complaint, is acting as an agent of the State and is relying upon the Eleventh Amendment, because it is claiming interference with the State's judicial procedures for review

of quasi-judicial findings-of-fact by municipal agencies.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. At the hearing on the TRO, Assistant City Attorney Liza Conroy cited New York Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, at 474 (1961), and unsuccessfully invoked the "clean hands" equity doctrine, and the City Council's quasi-judicial finding of "fraud" as ground for requiring the United States District Court to rule that it lacked subject matter jurisdiction and to deny the equitable relief sought (injunction) and to dismiss the civil rights complaint for "lack of subject matter jurisdiction." (Note, in this regard, the City of Henderson's response dated January 16, 1994, to Attorney Diamonds Petition for Rehearing at Appendix Page 4-16 and 4-17 of No. 94-662.

that shortly thereafter (3 months later) the Ninth Circuit withdrew its November 2, 1993 Opinion and substituted its May 4, 1994 Memorandum.

On June 4, 1990, following oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed. A copy of the Temporary Restraining Order and Preliminary Injunction is attached at Appendix 3 and 4 to the Petition for Writ of Certiorari in Case No. 92-643.

After further study of the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., supra, as impacted by the United States Supreme Court's ruling in Hicks v. Miranda, 422 U.S. 332 (1973), the City of Henderson declared their refusal to consent to federal jurisdiction [see

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990 (setting forth the same issues which were present in the federal civil rights complaint); and (2) a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present all of their federal constitutional claims in the Nevada law enforcement lawsuit. (See, in this regard, Question 4 in Case 94-662 and the clash, in such cases, with respect to the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411

(1964).

The City of Henderson further requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

On March 22, 1991 (almost six months after Defendants herein had filed their motion to dismiss and request for an immediate hearing), the United States District Court herein filed its opinion and order which denied the Defendants' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. A copy of the March 22, 1991 Opinion and Order is attached at Appendix 16 to the Petition for Writ of Certiorari in 94-662.

On March 29, 1991, Defendants indicated to the United States District Court at a pre-trial conference that they

intended to file a Motion in which they would request the Court to amend its order of March 22, 1991, so as to authorize an immediate appeal to the Ninth Circuit Court of Appeals and, if necessary, to the United States Supreme Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's state right to adjudicate important State issues such as licensing (revocation) procedures and judicial review by the State of Nevada of the quasi-judicial fact finding of the City Council in which it revoked the license of Fantasy Video Plus because of the use of fraud in obtaining the business license. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. United States District Court Judge Lloyd George, without ruling on Defendants' motion on the abstention doctrine, indicated at said pre-trial conference that he wished to proceed quickly and hold

the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal.

On April 1, 1991, Defendants filed their Motion to Amend re Interlocutory Order and Stay Proceedings. On April 9, 1991, Judge George entered an Order denying the Defendants' Motion to Amend his March 22 Order (to permit an interlocutory appeal). A copy of the April 9, 1991 Order is attached at Appendix 6 to the Petition for Writ of Certiorari in Case No. 92-643.

On April 15, 1991, Defendants filed a Petition for writ of mandamus and request for a stay with the Ninth Circuit Court of Appeals. In its pre-trial Petition for Mandamus, the City relied upon the jurisdictional issue which Huffman triggered, but did not argue the res judicata/collateral estoppel jurisdictional issue. On May 2, 1991, the Ninth Circuit issued an Order denying the

petition and request for a stay. A copy of the May 2, 1991 Order is attached at Appendix 7 to the Petition for Writ of Certiorari in Case No. 92-643.

On May 9, 1991, Defendants filed a petition for writ of certiorari with the United States Supreme Court, pursuant to Rule 13 of the Rules of the Supreme Court of the United States City of Henderson et al. v. U.S. District Court, Oct. Term 1990, No. 90-1771, together with an Application for Stay, addressed to the Honorable Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, pursuant to 28 U.S.C. 2101(e) and Rule 23 of the United States Supreme Court Rules, requesting a stay pending final action on the Petition for Writ of Certiorari. On May 20, 1991, Associate Justice O'Connor denied this Application.

Pursuant to 28 U.S.C. section 2101(f) and Rules 22.5 and 23 of the Supreme Court Rules, Defendants then resubmitted their Application for Stay, addressed to

Associate Justice Anthony M. Kennedy, together with a motion for an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. section 1651(a) and United States Supreme Court Rule 23.1. This reapplication relied on Associate Justice Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (9th Cir. 1987), which seemed to infer agreement with the Petitioner's contention that the United States Supreme Court had clarified Huffman, so as to require in a federal case such as this, a dismissal based upon lack of "subject matter jurisdiction." Justice Kennedy referred said Application to the entire Court for action, which denied the application on June 10, 1991.

Ultimately, the federal trial herein was continued to September 9, 1991.

On July 17, 1991, attorney Roger Jon Diamond, counsel for the federal Plaintiffs herein, sent a letter to Liza

Conroy, Assistant City Attorney for the City of Henderson, which referred to the joint case conference report due in the related state declaratory judgment action (City of Henderson v. Nevada Entertainment Industries, Clark County District Court No. A288647) (hereinafter "related state case"), and stated that state defendants would sign the report, but with the understanding that the Clark County District court case would not go to trial unless the City was successful in obtaining a dismissal of the pending federal case.

On August 9, 1991, the Scheduling Order in the related state case was filed, which set the matter for trial on the court's earliest available date beginning March 9, 1992.

On August 12, 1991, a Stipulation for Order continuing the federal trial herein and Order thereon was filed, which continued the federal trial date herein from September 9, 1991, to January 6,

1992, with calendar call on January 2, 1992.

On October 7, 1991, the United States Supreme Court issued an Order denying the petition for writ of certiorari in Case No. 90-1771. On December 2, 1991, the United States Supreme Court denied a petition for rehearing.

Both Plaintiffs and Defendants filed trial briefs, and submitted the case for trial on the briefs. By stipulation, the evidentiary record from the state quasi-judicial proceeding was filed with the U.S. District Court and designated to be used as the evidentiary record before the United States District Court on trial of the final injunction. It should be noted that the stipulation of the record of the State quasi-judicial proceeding into evidence clearly established the City of Henderson's claims that the federal court's exercise of jurisdiction presented a "collateral" attack on the City Council's order, warranting use of the All

Writs Act.

The City then renewed its motion to dismiss for lack of subject matter jurisdiction, and also moved to dismiss on the grounds of res judicata and collateral estoppel. At this point, the trial judge apparently became aware of the implications of the City of Henderson's refusal to waive its Eleventh Amendment privilege (and its claim of lack of "subject matter jurisdiction") and his refusal to apply the rule of law expressed in Miranda v. Hicks on the City's first Motion to Dismiss which was denied on March 22, 1991. See Appendix 16 to the Petition for Writ of Certiorari in 94-662. On June 17, 1992, the Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, on his own motion, signed an Order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would amend his prior order denying that request. The

June 17th Order is attached at Appendix 8 to the Petition for Writ of Certiorari in Case No. 92-643. On July 2, 1992, the Court signed an order amending its prior Order of March 22, 1992 so as to certify the same for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). A copy of said Order is annexed to the Petition for Writ of Certiorari in Case No. 92-643 at Appendix 9.

On August 3, 1992, the U.S. Court of Appeals for the Ninth Circuit denied the City's Petition for Permission to Appeal Pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. Rule 5. See Appendix 10 to the Petition for Writ of Certiorari in case No. 92-643.

On October 13, 1992, the City of Henderson filed a Petition for Writ of Certiorari to the United States Court of Appeals in City of Henderson, a Nevada Municipal Corp. et al. v. U.S. Dist. Court, Dist. of Nev. [Nevada Entertainment Industries, Inc., a Nevada Corp. and

Daniel Bishop, Real Parties in Interest], Oct. Term 1992, No. 92-643.

On November 27, 1992, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL), see Appendix 1 to the Petition in 94-662, in which the Federal Court, in the face of the Huffman abstention doctrine and the Feldman doctrine, relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be

authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal

pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. See Supplemental Brief in Case No. 92-643, at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in Case No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion in which it

denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a Motion for Judgment of Dismissal on Grounds of Comity and Lack of Subject Matter Jurisdiction, pursuant to Huffman v. Pursue, Ltd..

On December 22, 1992 the Court of Appeals (Noonan and T.J. Nelson) filed an order: (1) denying the Motion to Dismiss; (2) granting Licensees' Emergency Motion for Injunction Pending Appeal; (3) staying the

U.S. District Court November 25, 1992 Order; and (4) expediting the appeal, ordered a detailed brief schedule, and set the matter for argument in San Francisco during the week of April 12 (see Appendix 2 to the Petition in Case No. 94-662).

On December 22, 1992, the City filed its Notice of Cross-Appeal to the U.S. Court of Appeals for the Ninth Circuit from the Trial Judgment entered on November 27, 1992.

On May 10, 1993, the Court of Appeals for the Ninth Circuit heard oral argument during which the Court stated to the City's counsel of record that it was not interested in hearing argument of the Eleventh Amendment jurisdictional issue, which was framed by Justice Kennedy's separate opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, supra.

On November 2, 1993, the Court of Appeals filed an Opinion and certified the same for Publication under Circuit Rule 36-2, in which it reversed the Judge of the

United States District Court and held that the Court should have abstained under Huffman v. Pursue, Ltd., as contended by the City in its cross-appeal, but omitted any reference to the Eleventh Amendment "subject matter jurisdiction" issue. (See copy at Appendix 3 to the Petition for Writ of Certiorari in Case No. 94-662.)

The Court of Appeals further held in relation to attorney's fees that "The District Court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal." The Opinion contained the following conclusion:

> "Conclusion"
>
> "The decision of the district court refusing to abstain from exercising jurisdiction is reversed and the case is remanded to the district court with instructions to vacate its judgment and dismiss the complaint." (Our Emphasis.)

On November 30, 1993, Nevada Entertainment Industries, Inc. et al filed a petition for rehearing and suggestion that the Court rehear the matter en banc which

emphasized the fact that the Court's opinion did not hold that the federal court lacked subject matter jurisdiction. [The Petition for Rehearing introduced new contentions such as "consent" to federal jurisdiction. (See Appendix 4-10 through 4-17 to this Petition) and other contentions which are regularly advanced and considered in connection with the Wiener v. County of San Diego, 23 F.3d 263 (CA 9, 1994), interpretation of Huffman abstention but totally inconsistent with the Dubinka v. Judges of the Superior Court of the State of California, 23 F.3d 218 (CA 9, 1994), interpretation of Huffman abstention].

On January 18, 1994, the City of Henderson et al. filed their "Response to the Petition for Rehearing and Suggestion for Hearing en Banc." See copy at Appendix 4 to this Petition, at Appendix pages 4-10 through 4-17, where the City claimed that the Court of Appeals' failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issue was responsible for the confusion which regularly appears in Huffman abstention decisions. Compare

Dubinka, supra, with Wiener, supra. The City's Response (see Appendix pages 4-17) ended with the caveat that, notwithstanding these many new claims of Nevada Entertainment Inc., the Ninth Circuit was faced with a "bottom line" record fact on appeal; that is, that Assistant City Attorney Liza Conroy at the outset had objected to the Court's jurisdiciton under the Equity maxim of "clean hands." (See Appendix at page 4-17.)

On April 7, 1994, the Court of Appeals filed an order reading:

> "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9, 1993) is withdrawn."

See copy at Appendix 5 to the Petition for Writ of Certiorari herein.

On May 4, 1994, the Court of Appeals filed a Memorandum Opinion in which it noted in a footnote on page 1, that the Memorandum was not appropriate for publication and may not be cited to or by the court of the

circuit. Thereafter, the court reexamined the City's quasi-judicial proceedings and held that the district court's finding of deception by Nevada Entertainment Industries, Inc. et al., applied and was amply supported by the record and affirmed the district court's judgment on that basis, and dismissed the City's cross-appeal (i.e. that the civil rights complaint should have been dismissed for lack of "subject matter jurisdiction" under Younger v. Harris, 401 U.S. 37 (1971)) as moot. The Court made no ruling on the City's cross-appeal that the City was entitled to attorney fees. See copy of Memorandum decision at Appendix 6 to the Petition for Writ of Certiorari in in 94-662, and compare its earlier ruling on attorneys fee on November 2, 1993 at Appendix 3 to No. 94-662, at page 3-11.

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7 to the Petition in Case No. 94-662.

On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969, in an attempt to require the Court of Appeals to explain why it had withdrawn its November 2, 1993 opinion which had upheld the cross-appeal by the City re Huffman abstention, and why it had failed, and neglected, and/or refused to apply the rules of law established by the United States Supreme Court, which that opinion held were controlling, as the law of the case on the

City's cross-appeal.

On June 14, 1994, the Court of Appeals denied the City of Henderson's Petition for Rehearing. See Appendix 8 to the Petition for Writ of Certiorari in Case No. 94-662.

On June 17, 1994, the City of Henderson moved for leave to file a second petition for rehearing (based upon newly decided authorities: Kokkonnen v. Guardian Life Ins. Co. of America, 54 CCH S.Ct. Bull., p. B1724, decided May 16, 1994). See copy of Second Petition for Rehearing at Appendix 9 in Case No. 94-662. On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to the Supplemental Brief in Case No. 93-1969.

On July 11, 1994, the Court of Appeals denied the Petition for Rehearing of Nevada Entertainment and the City of Henderson's

motion for leave to file a second petition for rehearing. See Appendix 10 to the Petition in Case No. 94-662.

On July 25, 1994, the Court of Appeals granted Nevada Entertainment's motion to stay the mandate pursuant to Rule 41 (b). See Appendix 11 to the Petition in Case No. 94-662.

On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit, and on August 24, 1994, the Court of Appeals granted the Parties Joint Motion for Order Extending Stay of Mandate. See Appendix 12 to the Petition for Writ of Certiorari in Case No. 94-662.

THE ELEVENTH AMENDMENT FORBIDS THE FILING OF NEVADA ENTERTAINMENT'S FEDERAL COMPLAINT.

Nevada Entertainment's civil right complaint is not what Nevada Entertainment's petition represents it to be: an "independent action in the federal court." See copy of the civil rights Complaint at Appendix A (Appendix 2 to Reply Brief). In fact and as a matter of law, it is an action brought by a citizen of Nevada in the federal court against the Sovereign State of Nevada, which the Eleventh Amendment forbids, which collaterally attacks an order of the City Council of Henderson for actions taken by it, acting as an agent for the Sovereign State of Nevada, in a pending quasi-judicial license revocation proceeding within the Nevada State Judicial System, seeking revocation of Nevada Entertainment's business license on the ground of fraud in connection with its application for a business license. As such, the filing of the Federal Civil Rights Complaint, this trial, and this appeal in the federal court is in direct

conflict with and violates the Eleventh Amendment to the Federal Constitution and, precludes the Federal Court from assuming subject matter jurisdiction under its Article III powers and hearing such cause. In Welch v. State Dept. of Highway and Public Transportation et. al., 483 U.S. 468, at 472; 97 L.Ed.2 389, at 395 Justice Powell writing the plurality opinion for 4 justices held:

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.:
>
> The Court has recognized that the significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bring suit against the citizen's own State in federal court.

> even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 10, 33 L.Ed. 842, 10 S.Ct. 504 (1890). See Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.' Ex parte New York, No. 1, 256 U.S. 490, 497, 65 L.Ed. 1057, 41 S.Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L.Ed. 1063, 41 S.Ct. 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, n 17, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (plurality opinion of Stevens, J.); id., at 706-710, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (White, J., concurring in judgment in part and dissenting in part)."

See also the annotation "Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over suits against States' 106 L.Ed.2 660 at 677:

> "the following Supreme Court decisions have expressly recognized

that the Federal Constitution's Eleventh Amendment is not limited in its application to suits against a state as a named defendant, but rather that its application should be determined by the essential nature and effect of the suit in question: Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903; Re Ayers (1887) 123 US 443, 31 L.Ed. 216, 8 S Ct 164; Pennoyer v. McConnaughy (1891) 140 US 1, 35 L Ed 363, 11 S Ct 699; Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654; Ex parte New York (1921) 256 US 490, 65 L Ed 1057, 41 S Ct 588; Principality of Monaco v. Mississippi (1934) 292 US 313, 78 L Ed 1282, 54 S Ct 745; Worcester County Trust Co. v. Riley (1937) 302 US 292, 82 L Ed 268, 58 S Ct 185; and Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

It was observed by the Supreme Court in Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903, infra section 15[c], that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, and that the Eleventh Amendment is to be substantially applied in furtherance of its intention, and not evaded by technical and trivial subtleties.

The court in Re Ayers (1887) 123 US 433, 31 L Ed 216, 8 S Ct 164, infra section 15[b], also stating that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, added that such amendment's prohibition must be determined by a consideration

of the nature of the case as presented on the record.

In Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654, the Supreme Court recognized that looking through form to substance, the Eleventh Amendment applies not only where the state is actually named as a party defendant on the record, but also where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party.

In Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 71 Ohio Ops 2d 474, infra section 22, which involved a federal civil rights action against a state governor and other state officials, the Supreme Court stated that it was well established that the Eleventh Amendment barred suits against the state not only when it was the named party, but also when it was the party in fact. The court noted that the applicability of the Eleventh Amendment was to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding as it appeared from the entire record." (our emphasis).

The City of Henderson contends herein (Case No. 94-786) and in Case No. 94-662 as follows: [See] copy of the City's Reply Memorandum in Case No. 94-662 at Appendix A, p. 15 to this brief, reading:

"...Nevada Entertainment deliberately chose to collaterally

attack the quasi-judicial fact finding of 'fraud' made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding 'abstention' precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish 'standing' at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)"

RESPONDENTS' OBJECTIONS TO PETITIONERS QUESTIONS 1, 2 AND 3

Petitioner Nevada Entertainment is deliberately attempting to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copy of Reply Brief at Appendix A to this Brief (Appendix 4 to Reply Brief). The use of

this frivolous petition for writ of certiorari for that purpose is a further patent violation of the Eleventh Amendment. The Eleventh Amendment was specifically adopted by the States in 1792 to forbid the use of the federal court system as Nevada Entertainment has attempted to do in this Petition for Writ of Certiorari, and is the foundation for the Huffman Abstention doctrine which requires a dismissal of the federal complaint, for lack of subject matter jurisdiction. This "frivolous" petition is the direct result of the Ninth Circuit's determined refusal to apply the law of the land (Huffman Abstention). The duty of the Ninth Circuit was to "find" and "apply" the law; not to "find" and "defy" the law.

In the City of Las Vegas case supra; the Nevada Supreme Court specifically held, one year earlier, (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business

license by deception may not collaterally attack the City Council's "fraud" finding and obtain the judicial relief which Nevada Entertainment seeks in Questions 1-3 of its petition for Writ of Certiorari in 94-786 in the same quasi-judicial proceedings which the State has brought to revoke its license for fraud in its business application. The District Court of Nevada had ruled to the contrary (see Appendix A, Reply Brief at pages 4-7). The Nevada Supreme Court reversed the District Court on that issue. Had Nevada Entertainment filed its civil rights action in the State Court as a part of an appeal from the Quasi-Judicial Order of the City Council revoking their business license, as it was required to do under Nevada State law, Questions 1-3, which had been asked and answered in the City of Las Vegas ruling in the Nevada Supreme Court in 1989, would have been decided against Nevada Entertainment.

Question 1 as framed by Nevada Entertainment reads: "May a city violate the first and Fourteenth Amendment (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtained its business license by deception?" Question 3 reads: "To prove that a city utilizes an uncontitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 for the purpose of answering the above 3 questions, is frivolous as a matter of law because the federal courts below lack "subject matter jurisdiction", under the command of the Eleventh Amendment. "The

Judicial power of the United States shall not be construed to extend to any suit..."

STATEMENT OF THE CASE

The "stake" in this lawsuit is the sovereign, Eleventh Amendment right of the City of Henderson, acting as the agent for the State of Nevada, to enact by ordinance and apply the "conditional use" zoning principle and the States use of quasi-judicial proceedings to adult book stores in Henderson, Nevada, and to have such ordinances relating to the State's laws and license revocation procedure and the use of quasi-judicial proceedings, tested for the first time in the State of Nevada Courts under Watson v. Buck, 313 U.S. 387 (1941), not in the federal courts. This Court should place a focus on this principle and label it "Watson v. Buck Abstention." Further, it should also identify the fact that all such special abstention defenses ("Younger" "Huffman") are derived from the Eleventh Amendment commands. That claim (which initiated

this litigation) was made four years ago under the City's contention that a "conditional use" ordinance could be constitutionally applied in such a case, see 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1414 at page 1426-1429. See Case No. 90-1771, at pages 52-61. See also Case No. 92-643 at Point III on pages 46-57, copies of which are attached to this Brief at Appendix B to this Brief. That the City was "prudent" in its judgment that a Nevada state court (and not a federal trial court) should make that judgment under Watson v. Buck, see and compare the bizarre result (contradictory holdings) reached by two courts in the most recent United States District Court and United States Court of Appeals opinions in the Prince George's County case in 11126 Baltimore Blvd. v. Prince George's County, Md., 32 F.3d 109 (1994) (August 12, 1994)!!!

Respondent contends that the record on appeal in this litigation establishes "pure" "constitutional" error of great magnitude -- not merely "judicial" error. It is not a matter of "correcting" technical errors in cases of only local importance where the correction in no way promotes the development of the law." Anderson v. Haless, 459 U.S. 412 (1982) (Stevens,J., dissenting), and is not "concerned with the correction of errors in lower court decision" or other errors which do not attain the title and rank of "constitutional" error (see the text in Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, at Section 5.12, "Summary Disposition on the Merits," at page 251.) This is a real controversy which is deserving of a grant of writ of certiorari by this Court. It is universally recognized that "adult businesses" pose their own peculiar law enforcement problems. In that regard, see City of Henderson news articles at

Appendix C to this Brief. As the present time, the duplicate expense to State government in prosecuting such State sovereignty, Eleventh Amendment rights to conclusion in abstention cases in two court systems is substantial, (see Appendix D to this Brief, for example, showing the costs to the City of Henderson to date in asserting this Eleventh Amendment right). As further injury, the Ninth Circuit having ruled that "Huffman Abstention" controls, has withdrawn that decision rather than rule on the specific rule of law which has been the "focus" of the four years of litigation. Under the present practices, the "chance" of achieving a hearing on the merits and prevailing "cost-wise" in abstention litigation is routinely characterized as being on a par with "Russian roulette". It is for this latter reason that many abstention rulings, which should have been appealed, have not been appealed.

Nevada Entertainment's use of the

federal court to collaterally attack the quasi-judicial finding of fact of "fraud" by the City Council was intentional, and was designed to avoid confrontation in the State Court with the binding decision of the Nevada Supreme Court in City of Las Vegas v. Nevada Enterprises, (supra).

The procedural tactic Nevada Entertainment followed in the quasi-judicial proceeding in this case was identical to that employed by Pursue, Ltd. in the judicial proceeding involved in Huffman v. Pursue, Ltd. The only difference is that, in the Huffman case, Pursue, Ltd. obtained its "stay" from the federal district court; and in this Henderson case, Respondent first obtained the necessary "stay" from the City Council by mutual agreement to permit an appeal of the City Council's ruling; thereafter, Nevada Entertainment was able to continue that stay in force by virtue of the United States District Court's and Court of Appeals' injunctions.

Further, Nevada Entertainment subjectively must have known (through its attorneys who are "experts" in this area of the law and as a reasonable person) that its federal action was barred by the Eleventh Amendment and this Court's ruling in the Dayton case.

CONCLUSION

For all of the above reasons and others, given in Reply to the Response Brief of Nevada Entertainment in Case No. 94-662, and in this Response Brief to the Nevada Entertainment Petition in Case No. 94-786 and because the the Henderson trial facts and record on appeal parallel Huffman trial facts, as applied to the rule of law expressed in Dayton (which makes Huffman binding in quasi-judicial proceedings), Attorney Diamond's claim in his Response Brief in Case No. 94-662 of an "open question" is without support. Nevertheless, Petitions for Writs of Certiorari should be granted and both cases (Case No. 662 and Case No. 786)

consolidated and set for oral argument on the City of Henderson's claim of a right to reinstatement of the opinion and judgment which was reported on November 2, 1993, in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348, and relief for its Eleventh Amendment injury including its right to attorneys' fees under common law and statutory law and Rule 11 as the prevailing defendant under 42 U.S.C. Section 1988 in relation to the "focal" issue re the Eleventh Amendment in this four year litigation.

See Supplemental Brief in Case No. 94-662, being filed concurrently with this brief in Case No. 94-786 for additional reasons why a plenary review of these issues should be granted at this time.

DATED: December 1, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record
For Petitioners

APPENDIX A

REPLY BRIEF OF THE CITY OF HENDERSON IN CITY OF HENDERSON ET AL. V. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., ON A PETITION FOR WRIT OF CERTIORARI IN NO. 94-662.

[Reference: Respondents' Brief in Opposition at pp. 4, 39, and 44.]

BEST AVAILABLE COPY

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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DOCKETED ON OCTOBER 11, 1994

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....ii

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED..... 1

II. STATEMENT OF THE CASE..... 4

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION..... 4

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.....16

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.....20

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140..... 7

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).....2, 4, 9, 11, 14, 19, 20

Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331..... 7

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993).....17

Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826 (1989)..... 7

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc. 477 U.S. 619 (1986).....2, 3, 4, 16, 17, 20

Watson v. Buck, 313 U.S. 367 (1941)..... 9

STATE CASES

City of Las Vegas v. Nevada Industries, 772 P.2d 1275.....18

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
Eleventh.....2, 6, 7, 9, 10, 11, 15, 18, 19, 20

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

42 U.S.C.
Section 1983..... 6
Section 1988.....13

FEDERAL RULES

U.S. Supreme Court Rules
Rule 15.1 16
Rule 16.1 17

TEXTS

Stern, Gressman, Shapiro and Geller,
Supreme Court Practice,
(Seventh Ed.).....18

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED.

At pp. 2 and 5 of the Response Brief filed on November 9, 1994, Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment") has mischaracterized both the trial facts and the single legal issue which Nevada Entertainment has challenged. See p. 2, reading:

> "The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court having previously and expressly left open, should now resolve." (Our Emphasis.)

See page 5, reading:

> In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question." (Our Emphasis.)

In this Reply Brief, the City of Henderson submits that the excerpts of record on Nevada Entertainment's appeal and the City of Henderson's Cross-Appeal and the appellate records in this Court in

Case Nos. 90-1771, 92-643, and 93-1969 and at pages 7-29 of this Petition for Writ of Certiorari in Case No. 94-662, establish both as a historical fact and as a matter of law that the federal civil rights complaint which Respondent Nevada Entertainment, a citizen of the State of Nevada, filed in the U.S. District Court for the District of Nevada on April 24, 1990 directly interfered with the progress of the State of Nevada quasi-judicial (administrative) proceeding, which was then pending, and that said filing of a federal civil complaint of that nature, regarding a quasi-judicial matter which is properly before a Nevada tribunal, by a Nevada State citizen: (1) is forbidden by the Eleventh Amendment (i.e. the federal court lacks "subject matter jurisdiction"), and (2) was prohibited by this Court's landmark "abstention" decision in 1975 in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, and its more recent "binding" holding in 1986 in Ohio Civil Rights Commission v.

Dayton Christian Schools, Inc., 477 U.S. 619, at 629.

Nevada Entertainment's statement that the procedural historical facts in the trial court below are that: "Respondents filed their civil rights action after the decision of the City council became final" is an "egregious" misstatement of the trial record on appeal because: (1) an "abstract" statement of this nature, without reference to the record, is pointless; (2) it is true, both as a historical fact and as a matter of law, that the temporary restraining order and the preliminary injunction which were issued in Nevada Entertainment's federal civil rights action actually prevented the City Council's quasi-judicial order from becoming "final;" (3) it is true, both as a historical fact and as a matter of law that, from a procedural viewpoint the trial facts in this Petition cannot be distinguished from the trial facts in this Court's binding precedent in 1986, in Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, at 629 (1986), which extended the abstention doctrine expressed as to State judicial proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, to include quasi-judicial administrative proceedings; and (4) during the four years of litigation, three prior petitions on file in this Court have correctly stated and given notice that the record herein tracks the trial facts in Huffman, supra, which is binding upon the federal courts and Respondent has, nevertheless, recklessly continued to litigate. See "Statement of Facts" in No. 90-1971 at p. 22, 92-643 at pp. 5-12 and 19; 93-1969 at p. 15, and 94-662 herein, at pp. 4-36 generally, pp. 10-11 specifically.

II. STATEMENT OF THE CASE

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION.

At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief).

The concluding paragraph of the City Council's written order, dated April 16, 1990, which was served on Nevada Entertainment, read as follows (see Appellant's Excerpts Exhibit 1, pp. 2-3):

> "Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a/ FANTASY VIDEO PLUS, orders written notice of its decisions to licensees within five

(5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

[Signatures of Council]"

As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still "pending" up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day "stay" period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring "subject matter jurisdiction" on such

date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief.

The date ("April 24, 1990") is of paramount importance, because "the existence of federal 'subject matter jurisdiction' ordinarily depends on the facts as they exist when the complaint was filed in the U.S. District Court." See Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331, at fn. 4, emphasizing the above language and citing Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826, 104 L.Ed.2d 893, 109 S.Ct. 2718 (June 12, 1989) at 900; see also Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140, at 1143:

> "As a general rule, the proper point of reference for determining whether state proceedings are 'ongoing' is

the date the federal complaint is filed. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S.Ct. at 1529-30....See also Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceedings is pending when federal complaint is filed); Thomas v. Texas State Bd. of Medical Exam, 807 F.2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

"....

"The Younger line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. See, e.g., Younger, 401 U.S. at 44, 91 S.Ct. at 750; Huffman, 420 U.S. at 601-04, 95 S.Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' Cf. Huffman, 420 U.S. 604, 95 S.Ct. at 1208; Steffel, 415 U.S. at 462, 94 S.Ct. at 1217."

A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have "subject matter jurisdiction" on April 24, 1990, must, of necessity, follow from the "command" of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that "command" in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387 (1941). See also Questions I-IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii. a copy of which is attached at Appendix 3 to this Brief. It follows therefrom that Nevada Entertainment used the power of the federal court in an unlawful (Eleventh Amendment violation) tortious and unconstitutional manner, through the issuance and

enforcement of an unlawful (Eleventh Amendment violation) tortious, unconstitutional federal court temporary restraining order (April 27, 1990) and an unlawful (Eleventh Amendment violation) tortious, and unconstitutional preliminary injunction (May 30, 1990) (See copy of Injunction Orders in Appellants' Excerpts of the Record at Exhibits 2 and 3), to: (1) extend the City Council's 10 day stay indefinitely, and (2) unlawfully, tortiously, and unconstitutionally prevent the City Council's quasi-judicial Order of April 16, 1990 from becoming a final enforceable order, which could be used to execute the will of the City Council acting as an agent for the Sovereign State of Nevada.

Petitioner City of Henderson contends that the "impasse" which such injunction order created was subjectively brought to the attention of U.S. District Court Judge Lloyd D. George in June of 1992 when he first attempted to force the City to trial in the federal Court against its will.

Prior thereto, the City had added defensive pleas of "Res Judicata" and "collateral estoppel" to its continuing plea of "lack of subject matter jurisdiction." At that time, Judge Lloyd D. George must have become aware of the Eleventh Amendment impasse which arose out of the City's Huffman abstention challenge; i.e. that the City Council's quasi-judicial order of revocation had been "stayed" by his injunction order, and had not become final and, therefore, such pleas of "res judicata" and "collateral estoppel," though pleaded, would not be available to the City as a defense in the federal trial; for, at that time, and, on his own motion, he reversed his initial ruling, suspended the trial procedure and, thereafter, certified the matter for an interlocutory appeal to the Ninth Circuit. See Statement of Facts in the Petition herein at pp. 22 and 23.

The "impasse" which was created by such federal injunction order was also

brought to Nevada Entertainment's attention after U.S. District Court Judge Lloyd George filed his final judgment on November 27, 1992 (see copy in Appellants Excerpts of Record, at Exhibit 7). At that time, Nevada Entertainment filed a petition for rehearing with the City Council, which must be interpreted as a recognition and judgment on its part that the matter was still "pending" before the City Council because the federal court's temporary restraining order and preliminary injunction order which it served on the City had indefinitely extended the stay which it had obtained from the City Council to allow it to take a "proper" appeal. However, the City Council could not act on the matter because the trial court's injunction, which U.S. District Court Judge Lloyd George had lifted, was immediately continued -- this time at the request of Nevada Entertainment and at the instance of the Ninth Circuit Court of Appeals -- and has not yet been lifted. The Parties

by stipulation, have stayed the mandate to await this Court's ruling on this matter, including the City's right to recover attorney's fees as a prevailing defendant under the Dayton Christian Schools case and 42 U.S.C. Section 1988, and damages under the injunction bond which the United States District Court set when the federal court's injunction was placed in effect. (See Statement of Facts in the Petition herein at p. 28).

The trial facts clearly establish that Nevada Entertainment's Attorney did not (as it might have done) wait until May 2, 1990 to file its federal lawsuit, on which date the City Council's 10 day stay order would have lapsed, and the City Council's revocation order would then have "become" final. Such a fact situation (not here present)[1] would have presented a

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[1] For an example of an attempt to state such a case (not here present), see (Footnote Continued)

different case and controversy and different federal questions as to whether, in such cases, a federal plaintiff could show, by extinsic evidence that the Huffman abstention doctrine did not apply because he was bringing a new and independent case in the U.S. District Court, and

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(Footnote Continued)
the petition for writ of certiorari in Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., No. 94-786 which was docketed on October 7, 1994, and served on the City of Henderson by mail on October 29, 1994. Because the petition herein establishes that the Eleventh Amendment does not permit Nevada Entertainment to file a federal lawsuit under the historical facts set forth herein in Case No. 94-662, the City of Henderson considers the filing of Case No. 94-786 to be a "frivolous" filing, and has addressed that issue in the Supplemental Brief which is being filed concurrently with the Reply Brief herein (case No. 94-662) and will further address that issue and Nevada Entertainment's untrue Statement in this Petition at p. 7, reading:

> "The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion."

in a Response Brief and Cross-Petition in Case No. 94-786. See, also, Statement of Facts in the petition herein in No. 94-662 at pages 38-39.

had abandoned the litigation in his state case, and was willing thereby to accept and suffer the potential risk of defeat under a "res judicata" and "collateral estoppel" defense.

Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the

City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish "standing" at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.

The duty of a Respondent to respond in a brief in opposition to a Petition for Writ of Certiorari is set forth in Rule 15.1 as follows:

> "Brief in Opposition.
> "...the brief in opposition should address any perceived misstatements of fact of law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition."

Further, Rule 16.1 provides that, after consideration of the papers, the Court may make a summary disposition of the merits. Because the record on appeal herein is clear that this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) is a binding precedent and controls the disposition of this case [which the Ninth Circuit so held in its first opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)], see Statement of Facts in the Petition herein at pp. 38-39, this Court is presently empowered to grant summary relief to

Petitioner without setting the issue for oral argument. See Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, Seventh Edition at pp. 250 et seq., "(c) Summary Disposition of the Merits by Per Curiam Opinion." Petitioner submits that such a disposition would not be proper in this case because of the preeminent importance of the City of Henderson's additional claims of: (1) Eleventh Amendment injury and (2) the federal court's lack of subject matter jurisdiction, both of which are of national interest to all of the states.

Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copies at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the

States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., Case No. 94-786. Further, there is a continuing problem in the Ninth Circuit and other Circuits, with the correct application of the test to be applied in ruling on Huffman abstention challenges, and a serious need for a comprehensive opinion of this Court to settle the present abstention problem and controversy in the Ninth Circuit; that is, the divergent views of the 38 individual Ninth Circuit Court judges, and a refusal of some: (1) to "recognize" the Eleventh Amendment foundation of the Huffman abstention challenge, and (2) to defer in proper cases to the sovereign right of state courts to rule on important State interests under the Eleventh Amendment. This issue is further addressed in a Supplemental Brief in Case No. 94-662 and in the City's

Cross-Petition to Nevada Entertainment in Case No. 94-786, concurrently being filed.

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.

Petitioner cannot envision a "riper" "test case" in which to examine the merits of the City's claim that the refusal to apply Huffman abstention doctrine is the direct cause of the City's Eleventh Amendment injury. The Statement of Facts clearly documents: (1) a refusal of the U.S. District Court and the Ninth Circuit Court of Appeals to apply the "binding" rule of law established by this Court in its Huffman and Dayton Christian Schools abstention decisions; (2) judgments of both Courts which contravene the State of Nevada's rights under the Eleventh Amendment; and (3) Eleventh Amendment constitutional injury to the City of Henderson and the State of Nevada which is patent on the face of the record.

Dated: November 26, 1994

James J. Clancy

APPENDIX 1

STATEMENT OF FACTS IN PETITIONER'S SUPPLEMENTAL BRIEF IN NO. 92-643, AT PAGES 4-12.

[Refer: pp. 5 & 15 of Reply Memorandum.]

Text at page 5 reads:

"At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief)."

Text at page 15 reads:

"Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

"Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)."

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much." (Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

APPENDIX 2

COPY OF FEDERAL COMPLAINT

[Reference: pages 6 and 7 of Reply Memorandum.]

Text at pages 6-7 reads:

"As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still 'pending' up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day 'stay' period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring 'subject matter jurisdiction' on such date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief."

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State Bar No. 40146

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs, vs. CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants.	CV No. CV-S-90-264-LDG-LRL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. FILED: APRIL 24, 1990

Plaintiffs, Nevada Entertainment Industries, Inc. and Daniel Bishop allege as follows:

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983 in that this is an action by

Plaintiffs with regard to their attempt to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution; they are seeking to enjoin the Defendants from closing their constitutionally protected business.

2. Venue lies in the Southern Division of the District of Nevada; the City of Henderson is located in Clark County, Nevada, which is within the jurisdiction of the Southern Division.

3. Plaintiff Nevada Entertainment Industries, Inc., is, and at all times mentioned herein, was a corporation duly authorized and created by the laws of the State of Nevada. Plaintiff Daniel Bishop at all times mentioned herein, was and is the President of Nevada Entertainment Industries, Inc. and would be subject to criminal sanctions should Defendants not be enjoined from closing the subject business.

4. Defendant City of Henderson was and is, at all times mentioned herein, a

municipal corporation duly created by the laws of the State of Nevada and was and is located within Clark County and the Southern Division of the District of Nevada.

5. Defendant James Goff is sued in his official capacity as Chief of Police of the City of Henderson.

6. This action relates to the attempt by Plaintiffs to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution. The business is known is Fantasy Video Plus and is located at 1100 North Boulder Highway, Henderson, Nevada.

7. Defendants contend that the business in question (Fantasy Video Plus), is an adult business within the meaning of Henderson Municipal Code §19.16.006(B). For the purpose of this lawsuit, Plaintiffs will concede that the subject business, Fantasy Video Plus, is an adult business within the meaning of §19.16.006(B) of the Henderson Municipal Code.

8. On February 17, 1989, Plaintiffs

desired to commence a business in the City of Henderson wherein books, magazines and novelties would be sold and motion picture films (video tapes) could be sold and/or rented and exhibited. Plaintiffs desired, with respect to such business, to sell, rent, and exhibit materials protected by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs located a parcel of property at 1100 North Boulder Highway, Henderson, Nevada. On February 17, 1989, Plaintiffs entered into a five year lease for the premises at 1100 North Boulder Highway, Henderson, Nevada 89015. The premises consisted of a structure with 3,200 square feet of floor area. The lease would commence on April 1, 1989 and last until April 1, 1994.

10. At the time the lease was made, the City of Henderson had already enacted (May 1983), Chapter 4.102 of the Henderson Municipal Code regarding "video rental stores."

11. Henderson Municipal Code §4.102.020 required all "video rental stores" (defined as establishments which derived its gross profits from the sale or rental of sexually explicit movies, films or tapes) to certify that no such films would be sold or leased to persons under the age of 21.

12. With the exception of Chapter 4.102, Defendant City of Henderson did not further regulate premises selling or renting "adult films."

13. It was the intention of Plaintiffs to exhibit, sell, and/or rent the kinds of materials described in Chapter 4.102 of the Henderson Municipal Code (video rental stores).

14. The general requirements for obtaining a business license were set forth in Title 4 of the Henderson Municipal Code entitled "Business Regulations and License."

15. On March 7, 1989, after Plaintiffs executed their lease on February 17, 1989, Defendant City of Henderson adopted

Ordinance No. 1112 which repealed in its entirety former Chapter 4.04 entitled "Business Regulations and Licenses" and which replaced it with a new Chapter 4.04 entitled "Business Regulations and Licenses."

16. Accordingly, since the adoption of Ordinance No. 1112 on March 7, 1989, Defendant City of Henderson has been regulating businesses and has been determining whether or not to issue business licenses based upon the provisions of the new Chapter 4.04 which was adopted by Ordinance No. 1112.

17. By virtue of Henderson Municipal Code §4.04.020, all businesses in the City of Henderson must have a license issued by the City of Henderson.

18. Henderson Municipal Code §4.04.020 provides as follows:

> "(a) It shall be unlawful for any person to commence, carry on, engage in or continue in the City any business without first

obtaining a license and paying the appropriate license tax as provided by terms and provisions of this Title.

(b) A license shall only be issued if the applicant has a fixed place of business from which the business will be conducted, unless the Title specifically states otherwise. Once issued a license, the licensee shall not engage in business from any other premises other than the one for which the license was issued.

(c) No licensee shall allow another person to display a license on the licensee's premises, or to in any way allow any other person to use the licensee's premises to conduct business unless expressly permitted by the Division.

(d) Upon the filing of a

complete and accurate business license application and the payment of all required license fees, the applicant may be issued a temporary business license by the Division; provided, however, that the requirements of all appropriate federal, state, and county regulatory agencies have been met; and that the requirements of all Departments or Divisions of the City have been meet and properly approved. The temporary business license shall permit the applicant to engage in the business designated at the location so stated for a period of up to, but not to exceed sixty (60) days, within which all inspections and requirements imposed upon the applicant by the various Departments or Divisions of the City are to be complied with.

Upon the recommendation by the various Departments or Divisions within the City, the Division shall have the discretion to extend a temporary business license for a period of an additional sixty (60) days. It shall be the sole responsibility of the applicant to schedule all follow-up inspections necessary to comply with all the requirements and corrections. Should the applicant have not met the requirements as set forth by the Departments or Divisions of the City within the maximum prescribed time limit of one hundred twenty (120) days, the temporary license shall be deemed expired. Continued operation of the business shall constitute a violation of this Title, and the business shall be subject to legal action as prescribed by

this Title, the penalties for which are described in Section 4.04.230.

(e) The above stated provisions for a temporary business license shall be in addition to those provisions applying to privileged business licenses or any business which requires formal approval by the Council, unless the Director has first given tentative approval in accordance with section 4.04.170.

19. Henderson Municipal Code Section 4.04.150 sets forth the grounds for denial, non renewal, suspension, limitation and revocation of licenses. Specifically, Section 4.04.150 provides as follows:

"It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of

this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this title.

(a) Any license or permit application made pursuant to the provisions of this title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information required by this Title;

(2) All license and investigation fees are not paid;

(3) False or fraudulent statements

in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) The applicant, or any of its principals, do not qualify for, or have not obtained work card identification as may be required by the Division;

(6) A finding by the Division or by the Council that said business will not comport with the peace, health, safety, convenience, good

morals, or the general welfare of the public; (7) Lack of fitness of the applicant to engage in the particular occupation of business. For the purpose of this section, lack of fitness shall be defined as that quality or character of the license applicant which tends to establish that the applicant will not perform the services to be provided under his license or permit in a reasonable manner to the public. Particular factors to be taken into consideration by the Division or by the Council in determining whether the applicant

is unfit, are whether the applicant has a bad moral character, has intemperate habits or a bad reputation for truth, honesty, or integrity, or has a prior criminal conviction and/or a prior license denial, suspension, limitation or revocation, either locally or in another state or community, to the extent that it is possible that the acts which formed the basis of the conviction, denial, suspension, limitation, or revocation may be committed by the applicant under the license or permit being

applied for. In the event the applicant is a company, partnership, association, corporation, or other business entity, the Division or the Council may consider the fitness of each of the applicant's owners, partners or directors.

(8) For any other cause by the City through its Division or Council to be a just or equitable reason.

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be limited to

the following:

(1) The conduct of the business in an unlawful, improper, or irregular manner;

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) The existence of unsanitary conditions at, near, or in the premises which causes or tends to create a public nuisance or which injuriously

affects the public health, safety or general welfare;

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) The commission of, or permitting or causing the commission of any act in the operation of the business which act is made unlawful or is prohibited by any ordinance of the City, county, state or federal government;

(7) For any other cause by the City through its Division or its Council to be a just or equitable reason.

(c) All business licenses issued under this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable."

20. Henderson Municipal Code §4.04.200

authorizes certain Henderson officials to enforce the ordinance by citations and arrests. Those with enforcement powers include police officers as well as the Director of Licensing and his agents.

21. Henderson Municipal Code §4.04.220 provides that the violation of any provision of the Code is a misdemeanor.

22. Shortly after Defendant City of Henderson adopted Ordinance No. 1112, portions of which are quoted above, the City of Henderson also adopted Ordinance No. 1120, which enacted Titles 18 and 19 of the Henderson Municipal Code. Ordinance No. 1120 was a comprehensive revision of the Zoning Code and zoning law of the City of Henderson. On April 4, 1989, by Ordinance No. 1120, Defendant City of Henderson repealed its prior ordinances regarding zoning, and, as stated, replaced them with a new comprehensive "Development Code." Said Development Code purported to regulate zoning in the City of Henderson and still purports to regulate zoning in the City of

Henderson.

23. Prior to April 4, 1989, it was lawful for Plaintiffs to operate their proposed business at the property leased by them on February 17, 1989. That is, the property was commercial in nature and permitted the establishment of the business intended to be operated by Plaintiffs.

24. At the time Plaintiffs leased their property for the business in question, their property was zoned commercial (CC).

25. However, after the adoption of Ordinance No. 1120 on April 4, 1989, the City of Henderson purported to regulate where "adult businesses" could be located in the City of Henderson. That is, the effect of Ordinance No. 1120 adopted April 4, 1989, was to prevent Plaintiffs from commencing the business they intended to commence when they first leased the property on February 17, 1989.

26. Ordinance No. 1120 purported to allow adult businesses to exist only in one zone of the City of Henderson, the newly

created "CH" zone.

27. Section 19.16.006(B) of the Henderson Municipal Code provides as follows (Ordinance No. 1120):

> "Adult Businesses. Establishments based primarily on materials or performances that depict, describe, or relate to "specified sexual activities", as defined in Chapter 19.12."

28. Section 19.12.006(DE) of the Henderson Municipal Code provides as follows:

> "Sexual Activities, Specified: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, oral copulation, or sodomy; fondling or other erotic touching of human genitals (pubic region) buttocks, or female breasts."

29. Section 19.24.002 of the Henderson Municipal Code specifies the following with

respect to the "CH" Highway commercial district zone":

> "To provide sites for the auto-oriented commercial uses, including hotels, motels, service station, car washes, automobile sales and services, drive in restaurants, offices, limited warehousing and commercial services."

30. By virtue of Henderson Municipal Code §19.24.004, adult businesses, including bookstore and motion picture arcades, were and are only permitted in the "CH" zone and, within such zone, allowed only "with use permit, subject to location requirements set forth in Henderson Municipal Code Licensing Regulations."

31. After Defendant City of Henderson adopted its revised zoning law on April 4, 1989, no parcel of property in the City of Henderson was zoned "CH." Thus, nowhere in the City of Henderson could one lawfully operate an adult business, such as an adult

bookstore and arcade. Although the City of Henderson adopted the zoning provisions quoted above on April 4, 1989, the City did not establish any zone known as the CH zone. Thus, after April 4, 1989, the City of Henderson effectively prohibited adult bookstores and arcades from operating anywhere within the City of Henderson, in violation of the First and Fourteenth Amendments to the United States Constitution (Schad v. Borough of Mount Ephraim, 452 U.S. 61 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

32. Since the City of Henderson after April 4, 1989 effectively banned throughout its territory all adult bookstores and arcades by zoning ordinance, the zoning ordinance was a nullity, being unconstitutional on its face. In effect, the City of Henderson by violating the principles set forth by the United States Supreme Court in Schad v. Borough of Mount Ephraim, supra, had no zoning law regarding adult bookstores

and motion picture arcades.

33. Although, as stated above, Defendant City of Henderson totally prohibited adult bookstores and arcades from operating anywhere in the City of Henderson, in violation of the First and Fourteenth Amendments to he United States Constitution, Defendant City of Henderson also required that any such business obtain both a business license and a conditional use permit.

34. One may not obtain and/or retain a business license from Defendant City of Henderson if one's business is not zoned properly or if it does not have a required conditional use permit.

35. In addition to needing a business license as set forth above, Plaintiffs also needed a conditional use permit pursuant to Section 19.74.012 of the Henderson Municipal Code.

36. In order to obtain a conditional use permit, Plaintiffs would have to establish and the City Council would have to

find, among other things,

"That the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the Comprehensive Plan; will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City. . . ."

37. As stated above, after April 4, 1989, the City of Henderson was maintaining and did maintain an unconstitutional system with respect to adult bookstores and motion picture arcades in that, among other things, there was no property zoned CH and therefore no property on which such a business could be operated; in addition, even if there were such properties zoned CH, such business

would have to obtain a business license under the standards set forth above and also obtain a conditional use permit under the standards set forth above, such standards being unconstitutionally vague and unenforceable.

38. On August 31, 1989, Plaintiffs duly filed their application for business license. At the time Plaintiffs applied for their business license, they were informed by an official of the City of Henderson that there was no place in the City of Henderson were one could lawfully operate an adult bookstore and motion picture arcade. Therefore, if their application described the business as an adult business, Defendant City of Henderson would be compelled to deny the application.

39. On August 31, 1989, Plaintiffs submitted a written application on a form provided by the City of Henderson. Under the heading "General Information", Plaintiffs provided the following statement "Nevada Entertainment Industries dba Fantasy

Video Plus."

40. Under the heading "Occupancy Use Information" (type of business), Plaintiffs provided the following description:

"Mass media books and video store; novelty shop, etc."

41. On September 21, 1989, Defendant City of Henderson issued a revenue business license to Plaintiffs.

42. On or about December 5, 1989, Defendant City of Henderson re-zoned Plaintiffs' property at 1100 Boulder Highway, Henderson, NV from CC to CH. By rezoning Plaintiffs' property from CC to CH, Defendant City of Henderson determined that an adult bookstore and arcade could theoretically be operated at said location, thereby ostensibly eliminating one ground for invalidating the regulatory scheme for adult bookstores and arcades; that is, as of December 5, 1989, Defendant City of Henderson no longer purported to totally ban adult bookstores and arcades from the City of Henderson (thereby purporting to comply

with Schad v.Borough of Mount Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

43. However, although Defendant City of Henderson re-zoned Plaintiffs' property from CC to CH, Defendant City of Henderson still required a business license and a conditional use permit for the operation of an adult bookstore and motion picture arcade.

44. Defendant City of Henderson does not want any adult bookstores or motion picture arcades to be located anywhere within its territorial jurisdiction, but also does not want any court to invalidate its regulatory scheme. As a result, Defendant City of Henderson wants to create the impression that it allows such businesses when in fact it does not and does not want them.

45. On February 1, 1990, Plaintiffs opened their business and were immediately inspected by Defendant City of Henderson.

46. Defendant City of Henderson

concluded that Plaintiffs opened an adult bookstore and arcade. Because Defendant City of Henderson did not want such a business to operate anywhere within its City limits, Defendant City of Henderson took two actions to close Plaintiff's business. It introduced and, on March 13, 1990, adopted ordinance No. 1160, purporting to regulate "sexually oriented business."

47. Ordinance No. 1160 amended Title 4 of the Henderson Municipal Code by establishing Chapter 4.110. In essence, newly adopted Chapter 4.110, requires adult businesses (including Plaintiffs' business) to obtain a license; however, it would preclude a business such as Plaintiff's business from operating within 1000 feet of a place where alcoholic liquor is sold. Plaintiffs' business is within 1000 feet of a place where alcoholic liquor is sold but the ordinance creates a non conforming us for those businesses operating lawfully on March 15, 1990 (for a period of six months). Accordingly, while the adoption of Ordinance

No. 1160 reveals the obvious intent by the Defendant City of Henderson to shut down Plaintiffs' business, arguably Ordinance No.1160 has not yet affected Plaintiffs' business. There are other remedies provided by Ordinance No. 1160, and therefore the specific provisions of Ordinance No. 1160 will not be further discussed. Plaintiffs are not sure how the distance restriction will be determined and measured.

48. In addition to adopting Ordinance No. 1160, Defendant City of Henderson on March 13, 1990 initiated a proceeding to revoke Plaintiffs' business license.

49. Although Plaintiffs believe and still believe and contend that the ordinances of the City of Henderson purporting to regulate adult bookstores and arcades are facially invalid, out of an abundance of caution Plaintiffs decided to participate in an administrative proceeding provided by Defendant City of Henderson with respect to the revocation issue. The revocation hearing was conducted by the City

Council of the City of Henderson on April 10, 1990. After conducting the hearing, Defendant City of Henderson voted to revoke Plaintiffs' business license. At said hearing, Plaintiffs contended, unsuccessfully, that the regulatory scheme and the ordinances quoted above violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs objected to the revocation of their business license. The decision to revoke the license was arbitrary, invalid, and based upon incompetent and irrelevant evidence, and based upon an invalid ordinance. Plaintiffs made no material misrepresentations on their application. Had the information been presented which Defendant City of Henderson purportedly requested, it would not have been material to any valid criteria for granting or denying the license.

50. After the hearing conducted on April 10, 1990, Defendant City of Henderson purported to revoke Plaintiffs' business

license. A copy of the Decision and Order revoking the business license on April 16, 1990 is attached hereto as Exhibit 1.

51. The decision of April 16, 1990 takes effect on or about May 1, 1990.

52. Thus, as of May 1, 1990, unless this Court restrains the revocation or restrains enforcement of the ordinance, Plaintiffs will have to shut down their business. Plaintiffs contend that the business license ordinance and the conditional use permit ordinance are unconstitutional facially. Accordingly, it is probably not necessary for Plaintiffs to retain their business license. Instead, Plaintiffs have standing to challenge the facial validity of said ordinances.

53. Although unnecessary, Plaintiffs did exhaust available administrative remedies before the Henderson City Council.

54. Defendant James Goff was and is the Chief of Police of the City of Henderson. If Plaintiffs do not have a business license and/or conditional use

permit, Defendant James Goff, Chief of Police of the City of Henderson, will arrest, and/or cite Plaintiffs and their employees, in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs, accordingly, will be forced to close their business protected by the First and Fourteenth Amendments to the United States Constitution, unless this Court grants equitable relief as requested herein.

55. In addition to the Chief of Police, the Henderson Municipal Code also authorizes other City of Henderson officials to arrest and/or cite Plaintiffs. This would include the Director of Licensing, and agent and employee of Defendant City of Henderson.

56. Plaintiffs are without a legal remedy in the ordinary course of law. The threat of criminal enforcement of the Henderson Municipal Code against Plaintiffs by Defendants, is and will have a chilling affect on their First and Fourteenth

Amendment rights. They will be forced to close their business unless this Court grants a temporary restraining order, preliminary injunction, and permanent injunction.

57. Defendant City of Henderson has been since April 4, 1989, and still is, enforcing an unconstitutional regulatory scheme designed to preclude the operation of adult bookstores and motion picture arcades.

58. Plaintiffs business is located in the appropriate zone. If, in fact, it will become unlawful by virtue of Ordinance No. 1160 in six months, which Plaintiffs do not concede, then Defendant City of Henderson will also have unduly restricted the available locations wherein an adult business can be located, also in violation of the First and Fourteenth Amendments to the United States Constitution, but this particular challenge may be premature. If not, Plaintiffs are also attacking the constitutionality of Ordinance No. 1160 in this proceeding to the extent Defendants,

and each of them, attempt to enforce it.

59. Plaintiffs have been forced to retain an attorney to represent them in thisproceeding. If successful, Plaintiffs will pray for an award of attorney's fees pursuant to Title 28, United States Code, Section 1988.

60. A dispute has arisen among the parties with regard to the constitutionality of Ordinance Nos. 1112, 1120, and 1160 of the City of Henderson and actions taken by Defendant City of Henderson and threatened by Defendant City of Henderson and its Chief of Police. Accordingly, it is appropriate for this Court to render a declaratory judgment considering the constitutionality of various provisions and threatened actions and revocation proceedings of Defendants.

61. Unless this Court grants immediate relief, Plaintiffs will suffer irreparable injury in that they will be forced to close their business and be precluded from selling, renting, and exhibiting motion picture films, video tapes, and books and

magazines protected by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining Defendants, and each of them, from attempting to or from enforcing ordinances against Plaintiffs which would cause them to close their business at 1100 Boulder Highway, Henderson, NV;

2. For a temporary restraining order, preliminary injunction, permanent injunction, restraining Defendants and each of them, from revoking or enforcing the revocation of Plaintiffs' business license;

3. For declaratory judgment that Plaintiffs have the right to continue operating their business, as currently constituted, at 1100 Boulder Highway in Henderson, Nevada;

4. For declaratory judgment that

Defendant City of Henderson may not enforce its ordinances against Plaintiff's business at 1100 Boulder Highway, Henderson, Nevada;

5. For attorney's fees according to proof;

6. For such other and further relief as the court deems just and proper.

DATED: April 23, 1990

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Plaintiff

AFFIDAVIT OF DANIEL BISHOP

State of Nevada)
) SS
County of Clark)

Daniel Bishop, first being duly sworn, deposes and says:

1. I am the President of Nevada Entertainment Industries, Inc. and am also co-Plaintiff in this action. I have read the foregoing Complaint and the facts stated therein are true and correct to the best of my knowledge. If called upon as a witness, I could competently testify to such facts and I will be available for cross-examination by Defendants' counsel at the hearing on the request for temporary restraining order and at the hearing on the request for preliminary injunction.

_____

DANIEL BISHOP

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK,

STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	)	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to operate as an adult video business, the

licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately

to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issues at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of

the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAFEN

_____
CARLTON LAWRENCE

_____
DOROTHY VODENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

COPY OF QUESTIONS I & 1V IN PETITION FOR WRIT OF CERTIORARI IN NO. 92-643, AT pp. i-iii.

[Refer: page 9 of Reply Memorandum.]

Text at page 9 reads:

"A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have 'subject matter jurisdiction' on April 24, 1990, must, of necessity, follow from the 'command' of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that 'command' in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387(1941). See also Questions I & IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii, a copy of which is attached at Appendix 3 to this Brief."

Question I reads: "Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. Dist. Court has not found the "extraordinary circumstances" which the 11th Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie?"

Question IV reads: "Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Sec.1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

APPENDIX 4

COPY OF CITY OF LAS VEGAS V. NEVADA INDUSTRIES, INC., 772 P.2d 1275 (NEV. 1989).

[Reference: page 18 of Reply Memorandum.]

Text at page 18 reads:

"Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copy at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., No. 94-786."

[CONTENTION: The City of Las Vegas case, supra, specifically held one year earlier (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business license by deception may not obtain the judicial relief Nevada Entertainment seeks (in Questions 1-3 of its Petition for Writ of Certiorari in 94-786) in the quasi-judicial proceedings which are brought by the State to revoke its license for fraud in its business application.]

Question 1 reads: "May a city violate the first and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtianed its business license by deception?" Question 3 reads: "To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 is frivolous because the federal court below lacked subject matter jurisdiction under the 11th Amendment violation.

SUPREME COURT OF

NEVADA

CITY OF LAS VEGAS, Nevada, Appellant, v. NEVADA INDUSTRIES, INC., a Nevada Corporation, Respondent.	CASE NO. 18491 OPINION. DATED: April 25, 1989

Business challenged city's revocation of its business licenses. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., issued permanent injunction and writ of mandamus prohibiting enforcement of business license ordinances against business, and city appealed. The Supreme Court, Young, C.J., held that: (1) misrepresentation in license applications that business was not sexually oriented justified revocation of licenses, and (2) ordinance provision serving as basis for imposition of fine against business was invalid.

Affirmed in part and reversed in part.

1. Licenses:

Falsely representing on applications for business licenses that business was not sexually oriented justified city's revocation of business licenses pursuant to municipal code, irrespective of any First Amendment interests. U.S.C.A. Const.Amend. 1.

2. Municipal Corporations:

While municipalities generally enjoy power to enforce their ordinances using fines, such ordinances must fix valid maximum penalty.

3. Municipal Corporations:

Standardless ordinance invites discriminatory enforcement.

4. Licenses:

Municipal Code provision authorizing imposition of penalty upon business, determined to have misrepresented its status as sexually

oriented business in application for business licenses, was invalid, as it vested city officials with unlimited discretion to establish fines and posed great risk of excessive fines. Const. Art. 1, §6.

5. Licenses:

Municipal Corporations:

Portions of penalty provision of municipal business license ordinances determined to be invalid for failing to establish valid maximum fine could be severed without defeating objectives of ordinance and, therefore, validity of remaining portions of ordinance would be sustained. Const. Art. 1, §6.

George F. Ogilvie, City Atty., Robert Yeargin and Val Steed, Deputy City Attys., Las Vegas, for appellant.

Alan B. Andrews, Las Vegas, For respondent.

OPINION

YOUNG, Chief Justice.

This action arose out of the appellant Las Vegas City Council's (Las Vegas) decision to revoke respondent Nevada Industries' business licenses. Nevada Industries operates a lounge facility with a jacuzzi and meeting rooms. A detective observed nudity and the exposure and touching of female breasts during a visit to the facility.

After an investigation and a hearing, Las Vegas revoked the business licenses because it found that Nevada Industries is a sexually oriented business, i.e. a "nude show." Consequently, it found that respondent made a misrepresentation on its application for business licenses by stating that it would not operate a sexually oriented business.[1] Moreover, Las Vegas found that Nevada Industries violated a Las Vegas zoning ordinance prohibiting the establishment of a sexually oriented business within one thousand feet of another sexually oriented business, church, school, park or playground.[2] Las Vegas also found

that Nevada Industries violated ordinances concerning the keeping of business records and failed to properly maintain its State Industrial Insurance System (SIIS) coverage. Pursuant to these findings, Las Vegas revoked Nevada Industries' business licenses and fined respondent $50,000.[3]

On Nevada Industries' motion, the district court issued a writ of mandamus and reviewed Las Vegas' actions. The district court concluded that Nevada Industries' activities enjoyed First Amendment protection because Las Vegas sought to regulate them as a "nude show." The court found the applicable ordinances unconstitutional as applied to this protected activity, and issued a permanent injunction and a writ of mandamus prohibiting their enforcement against Nevada Industries. Las Vegas appeals from the district court's judgment.

[1] Las Vegas' finding that Nevada Industries' activities constituted a nude show provided the basis for its conclusion

that Nevada Industries made misrepresentations on its application for a business license, and for its finding that Nevada Industries violated Las Vegas' zoning ordinance by operating within one thousand feet of another sexually oriented business. LVMC §19.74.020(I) addresses sexually oriented businesses, and defines "nude show" as "any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or as an attraction for business." The provision also defines adult motion picture theaters, adult bookstores, and similar establishments as sexually oriented businesses. Las Vegas correctly points out that the sucking of a woman's breast by a man, as observed by one of its detectives, constitutes "sexual conduct" under LVMC §19.74.010(A)(1) as do other actions which the detective observed.

Nevada Industries' facilities and advertising support the conclusion that it intended to operate in its present manner

(i.e. as a sexually oriented business) at the time it applied for its business license. Therefore, the record demonstrates that Nevada Industries falsely represented on its license application that it was not a sexually oriented business.

Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code.

Because Las Vegas determined that Nevada Industries' operation included a "nude show," the district court held that this case must turn upon First Amendment principles. According to the United States Supreme Court, under some circumstances,

nude dancing might be entitled to First and Fourteenth Amendment protection. California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). Thus, the district court concluded that Las Vegas' licensing procedures must meed the strict constitutional standards imposed on all statutes which impinge upon First Amendment rights. We disagree.

Las Vegas characterized the entertainment provided by Nevada Industries as "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case.

We note that under our decision in this case, Nevada Industries remains free to reapply for new business licenses. However,

should they continue to operate as a sexually oriented business, Las Vegas Municipal Code section 19.74.030 provides a basis for denying their licenses.

Accordingly, we reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business licenses. However, we affirm the district court insofar as it enjoined the imposition of Las Vegas' $50,000 fine upon respondent.

[2-5] According to Las Vegas Municipal Code section 6.88.120, after a hearing on a dispute, the board of commissioners shall render a decision on the merits, including "the penalty to be imposed, if any." After concluding that Nevada Industries violated Las Vegas' business licensing ordinances, the board of commissioners fined respondents $50,000.

Generally, municipalities enjoy the power to enforce their ordinances using fines. Commonwealth v. Cabell, 199

Pa.Super. 513, 185 A.2d 611, 616 (1962). However, the ordinance must fix a valid maximum penalty. Verona v. Shalit, 96 N.J.Super. 20, 232 A.2d 431, 433 (App.Div.1967). Because the penalty provision of section 6.88.120 fails to provide any limitation on the fines imposed, that clause is void. Id.

Municipal ordinances must not be oppressive. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 340 (1956). In its present form, section 66.88.120 is invalid because it vests Las Vegas officials with unlimited discretion to establish fines. A standardless ordinance invites discriminatory enforcement. Baer v. City of Wauwatosa, 716 F.2d 1117, 1124 (7th Cir.1983). Because of the great risk of excessive fines resulting from enforcement of the penalty provision, it cannot stand.[4] Nev. Const. art. 1, §6.

When invalid provisions of a municipal ordinance are severable without defeating the objectives of the ordinance, we sustain

and give effect to valid portions of the ordinance.[5] City of Portland v. Dollarhide, 71 Or.App. 289, 692 P.2d 162, 167 (1984). Accordingly, we sustain the validity of the remaining portions of section 6.88.120.

Therefore, we affirm the judgment of the district court insofar as it enjoins the imposition of Las Vegas' fine on Nevada Industries, and reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business license.[6]

STEFFEN, SPRINGER and MOWBRAY, JJ., concur.

1/ Las Vegas Municipal Code §6.02.330 provides in part:

> 6.02.330 **Disciplinary action-Good cause designated.** The licensee may be subject to disciplinary action by the Board of Commissioners for good cause, which may include, but is not limited to:
>
> (A) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information required in the application;

(B) The licensee or any of its principals fails to satisfy any qualification or requirement imposed by this Code, or other local, State or Federal Law or regulation pertaining to the particular license or approval for suitability sought or held;

. . . .

(F) The licensee or any of its principals has committed acts which would constitute a crime involving moral turpitude, or involving any Federal, State or local law or regulation relating to the same or a similar business;

(G) When substantial information exists which tends to show that the licensee or any of its principals is dishonest or corrupt;

. . . .

(I) The actual business activity constitutes a public or private nuisance, or will be or is conducted in an unlawful, illegal or improper manner;

. . . .

2/ In Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a zoning ordinance similar to that implemented by Las Vegas in this case. The Court noted that the mere fact that commercial exploitation of material arguably protected by the First Amendment is subject to zoning and other licensing criteria is an insufficient reason for invalidating these ordinances. Id. at 62, 96 S.Ct. at 2448. Moreover, we must give great respect to Las Vegas' interest in preserving the quality of urban life and to

2/ Cont.
its need to experiment with solutions to difficult problems. Id. at 71, 96 S.Ct. at 2452-53. Thus, we find that the zoning ordinance implicated in this case is constitutional.

3/ The City imposed the fine pursuant to Las Vegas Municipal Code §6.88.120 which provides that:

> 6.88.120 Decision by Board. After the hearing of a contested matter, the Board of Commissioners shall render a decision on the merits which shall include findings of fact and conclusions of law and the penalty to be imposed, if any, and shall thereafter make and enter its order in its minutes in conformity to such decision. The decision of the Board shall be served on the parties personally or shall be sent to them by registered or certified mail. The decision shall become and remain effective upon such service unless the Board shall otherwise order.

4/ According to NRS 193.170, whenever a statute prohibits the performance of any act but fails to impose a penalty for the violation thereof, commission of the act shall be a misdemeanor.

5/ We note that the vague penalties referred to in section 6.88.120 can easily be clarified by amendment.

6/ The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

APPENDIX B

PORTION OF TEXT OF PETITION FOR WRIT OF CERTIORARI, FILED IN CONNECTION WITH CASE NO. 92-643, AT POINT III ON PAGES 46-57 ["THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED."]

[Reference: Respondents' Brief in Opposition at 49.]

license revocation proceeding is barred.

III

THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED.

In Watson v. Buck, 313 U.S. 387 (1941), the U.S. District Court for the Northern District of Florida had enjoined a Florida State containing a severability clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, this Court held at pages 401-402 that a state statute which contains a severability clause must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort mights be made to apply it ... " before a federal court can interfere with the right of the state court to interpret such legislation.

In such a case it is reversible error for a federal court to grant an injunction and preempt the state court from its func-

tion, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights...." Further, under Watson v. Buck, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." Otherwise, the defenses must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the United States Supreme Court of federal questions. It is patent upon the face of the record below that the Watson v. Buck requirements of "irreparable loss"..."both great and immediate" have not been established.

(1) A NUMBER OF IMPORTANT STATE INTERESTS ARE INVOLVED

This federal case has impaired a number of important and compelling state interests and rights of the City of Henderson:

(1) The exercise of Home Rule

powers; i.e. to ensure that the license issuing and zoning process is kept free from the perpetration of material fraud by individual license and zoning applicants;

(2) The administration of state laws, to obtain compliance with the precise standards embodied in those laws, and to conduct the state enforcement process free from unwarranted federal interference which disrupts municipal efforts;

(3) The right not to have newly-enacted comprehensive municipal zoning ordinances subjected to federal judicial review to protect the legitimate interests which underlie state laws, until after the state court system has been given an adequate opportunity to review and interpret said laws and the issues are ripe for adjudication;

(4) To practice judicial economy by requiring that litigation involving the above judicial functions be conduc-

ted in the most efficient forum (i.e. the State Court);

(5) A quick, definitive determination of matters involving the operation of a business without a license. Such an activity constitutes a "per se" public nuisance and "per se" irreparable harm which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083.

(6) Suppression of fraud in the governmental license application process. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, infra, at p. 41-42. It is contrary to established public policy to obstruct state enforcement action against applicants who deliberately make false statements to the government in a business application in order to obtain a license.

(7) Control of the issuance and revocation of revenue-based business licenses, as part of a local revenue collection (taxation) scheme.

Unless effective, summary relief is accorded cities against such unlawful "collateral" appeals by this Court exercising its corrective power under the All Writs Act, the City of Henderson will sustain the same type of irreparable harm as that suffered by the state of Ohio in the Huffman case, and by other cities in similar cases, where important state laws are prevented from being presented to the state appeals courts and this Court for an authoritative construction of state law under the federal Constitution[7].

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[7] Because of the federal court interference with state appellate proceedings, in Huffman, the substantive appellate question involving application of state law (re "closure" of a public nuisance) was never decided, and could never be presented to this Court for definitive review. Huffman involved the power of a state court to close a 100% continuing public nuisance (obscenity) [utilizing a remedial approach acceptable under Red Light Abatement statutes, where the object is the reformation of property used to conduct a per se public nuisance (prostitution)]. Because a final state determination on this important legal issue, regarding the scope of available state remedies, was collaterally blocked by the federal courts in Huffman, an Ohio

(Footnote Continued)

(Footnote Continued)

appellate determination on "closure" was unavailable as a precedent for the state of Ohio and for other state court systems, and the substantive legal issue could not be reviewed by this Court, leaving the "closure" issue, to date, unsettled across the Nation.

The question of the extent to which the states may exercise the remedy of "closure" in connection with the exercise of their police power has arisen in other state cases, with varying results. See State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc. et al., 102 Idaho 451 (1982), jur. noted 454 U.S.1140 (1982), and app. dismissed 455 U.S. 1009 (1982), in which a unanimous State Supreme Court upheld the constitutionality of one-year closure provision and award of attorney fees against a pornographic bookstore. Compare, Jurisdictional Question #1 posed in the Petition for writ of certiorari in Cooper v. Mitchell Brothers Santa Ana Theater et al., No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90 (1981), and Jurisdictional Question #1 posed in Cooper v. Mitchell Bros. Santa Ana Theater et al., No. 82-345, October Term 1982, denied in 459 U.S. 944 (1982). Because the applicability of "closure" to the public nuisance abatement process involving pornographic outlets has never been answered by this Court, after a protracted, time-consuming and expensive abatement procedure in which it was demonstrated that the defendant Mitchell Brothers had engaged in the regular continuous exhibition of obscene films as a course of conduct continuing over a period of 10 years, the City of Santa Ana was forced to "throw in the towel" in 1987, and settled the controversy by paying defendants their attorney's fees and allowing their pornographic outlet to continue operations in Santa Ana.

(2) THE STATE COURT WITH A "DIRECT" ATTACK ON THE "PENDING" STATE ACTION PROVIDES A MORE EFFICIENT JUDICIAL FORUM FOR THE RESOLUTION OF DISPUTES THAN THE "COLLATERAL" CHALLENGES BEING ASSERTED IN THE FEDERAL COURT AGAINST THE STATE STATUTES AND CITY ORDINANCES IN SUCH "PENDING" CASES.

The exercise of federal jurisdiction striking a state statute or ordinance is not proper, except where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it." Watson v. Buck, 393 U.S. 387 (1941).

Without doubt, the U.S. District Court has jurisdiction in the instant case to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional and a state court action is pending, under Middlesex County Ethics

Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task routinely performed by state court.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that

> courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and do not function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory

construction is to save and not destroy."

In examining the record of this case, it is apparent that the state system is the most efficient and proper forum for interpreting the interplay of the state statutes and municipal ordinances involved. Were the constitutionality of the "conditional use" zoning laws an issue[8],

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[8] The constitutionality of the conditional use in the CH zone is not yet in issue, inasmuch as the federal plaintiffs never applied for a variance or a special use permit. Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (CA9, 1988); Ill. Commerce Comm'n v. Thompson, 318 U.S. 675, and National Bank v. Bd. of County Commissioners, 264 U.S. 450 (1924). When the conditional use ordinance is properly made an issue, the construction to be given the newly enacted legislation is one for the Nevada Courts, not the U.S. District Court. See Watson v. Buck, supra, discussed at pages 46 - 47, herein, and U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971) and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. Compare, in this regard, the construction given by California Courts to People v. Library One, Inc., 229 Cal.App.3d 873 (1989), and Thomas v. County of Los Angeles, 232 Cal.App.3d 916 (1991), re the effect of this Court's ruling in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) on specific time limits during which decision is required on permit applications, and note, in this regard, that the issue here is license revocation, not license procurement.

there is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied, and only a state court has both the right and duty to give the same a constitutional interpretation. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [4th Cir. 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S. Court of Appeals for further consideration in light of FW/PBS, 493 U.S. 215 (1990)].

The question as to whether a state statute is severable is more properly a matter for the state court. In a statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court

upholding the ordinance as being constitutional on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding the fact that this Court held the ordinance to be unconstitutional on its face[9]. See in this regard, Associate Justice White's opinion in Metromedia, Inc., announcing the judgment of the Court, at 521, fn. 26, wherein he addresses the issue of severability and the right of state courts in that regard.

IV

FEDERAL PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN THAT THEY HAVE FAILED TO PLEAD AND PROVE WHY THE PRINCIPLES ESPOUSED IN WATSON V. BUCK AND HUFFMAN V. PURSUE, LTD. DO NOT CONTROL SO AS TO REQUIRE A DISMISSAL FOR LACK OF FEDERAL JURISDICTION.

Under the rationale expressed in Allen

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[9] Unlike the "Humpty-Dumpty" approach of the federal court system (which cannot construe a state law), the superiority of the state forum is self-evident where the "egg" can immediately be put back together again.

APPENDIX C

HENDERSON NEWS ARTICLES REPORTING UPON CRIMINAL ACTS (TWO MURDERS) UPON THE PREMISES INVOLVED.

[Reference: Respondents' Brief in Opposition at 51.]

Clerk found murdered in porn viewing booth

4/16/90

By Katherine E. Scott
News Staff Writer

A 22-year-old night clerk at Fantasy Video Plus was found shot to death inside a viewing booth early Sunday morning following an apparent robbery, according to the Henderson Police Department.

Denver Duane Turner was shot three times in the back of the head with a .22 caliber weapon, the Clark County Coroner's Office reported Monday. Police said Turner was last known to have been alive when his roommate spoke with him about 1 a.m. Sunday.

Police were called around 5:20 a.m. by a customer who found Turner's body at the back of the adult-oriented novelty store, HPD Detective Richard Perkins said Sunday at the scene. He said money was missing from the store.

"A security video tape is being reviewed as part of the investigation," police stated in a press release. Police are asking any persons with information to contact investigators at 565-2031 or 565-2004, the detective bureau at 565-2009 or the police department at 565-8933.

Police said Turner's body was found in a viewing booth in the southeast section of the Boulder Highway store. The door to the booth was open when the customer—a man in his 40s—found the victim.

Police said store management locked the business Sunday morning, with plans to open the following day. An electronic reader board in front of the store said the business would be closed until noon Monday, with no late fees to be charged.

That was believed to be the first time the store has closed its doors since opening on Feb. 1. The city of Henderson revoked the company's business license April 10 due to alleged misrepresentations in the application process, but the store has remained open pending a lawsuit filed April 24 in U.S. District Court.

Henderson Assistant City Attorney Liza Conroy said last month that the city is attempting to have the action moved to Clark County District Court because it believes licensing is the issue. Fantasy Video spokespersons have said their constitutional rights are being denied by the city, and that the case should remain in federal court.

Fantasy Video murder suspects caught in Oregon

11/14/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a Henderson porn store clerk are being held in Oregon pending extradition to face charges here, according to the Henderson Police Department.

Police said Amber Lynn Adams and Lance Matthew Reberger were apprehended in Coos Bay, Ore. on Friday morning, after local police entered them as suspects in the National Crime Information Computer.

They are suspected of shooting 22-year-old Denver Duane Turner early Nov. 4 as he worked in Fantasy Video Plus, an adult-oriented novelty store located on Boulder Highway.

The victim was shot three times in the back of the head, according to the Clark County Coroner's Office. Police said his body was found in a viewing booth in the back of the store by a customer who entered the store shortly after 5 a.m.

A police investigation found evidence implicating Adams and Reberger, providing enough information for them to be placed in the NCIC system, police said. Adams was also known with the surname Harvey, police said.

No cash taken in robbery at Fantasy Video

9/24/90

No cash was taken in an armed robbery at Fantasy Video last week, according to the Henderson Police Dept.

Police said a young, blond man took less than $100 worth of sexual aids from a clerk at the Boulder Highway store about 4:25 a.m. Thursday. A small caliber chrome automatic pistol was used, according to police.

"A security camera was operating at the time and the suspect was photographed," HPD Assistant Chief Kip Botkin said Monday. He added that police detectives are investigating the incident.

Murder suspects to fight extradition

11/15/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a clerk at Fantasy Video Plus, who Henderson Police said had first agreed to waive extradition from Oregon, instead said they would fight extradition when they appeared before a judge Tuesday in Coos Bay, Ore.

Amber Lynn Adams, 22, and Lance Matthew Reberger, 24, face charges of murder, robbery and burglary in the death of 22-year-old Denver Duane Turner at the adult-oriented novelty store on Boulder Highway. They were arrested Friday at a homeless shelter in the Oregon town, HPD Sgt. Ray Moser said in a telephone interview Tuesday.

HPD Detective Monty Sparks, who traveled to Oregon to investigate the case, said that "during the court appearance on Tuesday they requested council, and their extradition hearing was continued until Tuesday of next week."

Sparks said during a telephone interview Wednesday that the pair "were abusive and obnoxious during their court appearance, and totally disrespectful."

Moser said the two were identified as suspects following a tip which led investigators to several persons who provided enough evidence of their guilt that police were able to seek a warrant for their arrest.

He said a video surveillance tape police removed from the store had run out before the murder occurred. Turner was believed to have been killed approximately between 1 a.m. and 5 a.m. on Nov. 4.

Henderson police entered Adams and Reberger into the National Crime Information Computer on Thursday, Nov. 8, Moser said. He said police officers in Coos Bay recognized the couple from a recent child abuse report, and arrested them at the homeless shelter where they were staying.

Sparks said Oregon's Child Protective Services is caring for Adams' 3-year-old son. He said the child's natural father, who lives in Las Vegas, is seeking custody.

Police said Adams, also known with the surname Harvey, was from the Las Vegas area. Reberger was believed to be a transient who came here from Florida.

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Fantasy Video murder suspect gets second preliminary hearing

5/16/19

By Katherine E. Scott
News Staff Writer

One defendant in last year's murder of a clerk at Fantasy Video Plus was scheduled recently for a second preliminary hearing in Las Vegas Justice Court on June 18.

Lance Matthew Reberger was to stand trial Monday in Clark County District Court on charges of murder, robbery and burglary. However, his case was remanded for a new preliminary hearing following a May 3 court appearance.

Defense attorney Phil Dunleavy said Wednesday that he was assigned the capital murder case after it had reached District Court for trial. "I didn't feel the man had

Murder suspect trial starts Monday

6/6/91

By Katherine E. Scott
News Staff Writer

Amber Lynn (Harvey) Adams, 22, is scheduled to stand trial Monday in Las Vegas District Court for the Nov. 4 murder of a local adult-oriented video and novelty store clerk.

Adams and 24-year-old Lance Matthew Reberger are charged with murder, robbery and burglary for the death of 22-year-old Denver Duane Turner inside Fantasy Video Plus last year. Reberger faces a June 18 preliminary hearing in Las Vegas Justice Court.

A motion to suppress evidence was denied last week, and Adams' court dates still stood as of presstime, according to court records. A calendar call is scheduled today.

Adams and Reberger were arrested on Nov. 9 in Coos Bay, Ore., after police there received a bulletin from Nevada that they were suspected in a murder here. Oregon officers recognized the couple from a child-neglect investigation a day earlier regarding Adams' young son.

Both waived extradition, and Adams also waived her preliminary hearing. She was later found competent to stand trial following a psychiatric evaluation ordered by Las Vegas District Court.

She was remanded to Justice Court for a March 18 preliminary hearing, then was bound over for a jury trial, scheduled to begin on Monday.

Porn store robbed

9/9/93

Henderson police are seeking a gunman who robbed the Pure Pleasure adult book and video store on Boulder Highway Tuesday night.

"The clerk advised that a [man in] a mask, brandishing a shot He fled on foot with an undisclosed amount of cash.

The suspect was wearing blue denim pants and a dark T-shirt, police said. Any person with information are asked to call the

ıre Pleasure suspect nabbed

12/21/93

By Thomas Moore
News Staff Writer

nderson Police have arrested ın suspected of robbing the Pleasure adult bookstore e and is suspected of robbing ıilar store in Las Vegas. uart Whiting, 22, of no known ress was arrested last Wednesday for the robberies which occurred on Dec. 14 and Nov. 26. He was arrested at Vo-Tech, where he was attempting to pick up his girlfriend.

Whiting was transported to the Henderson Jail and booked on two counts of armed robbery. He is being held on $60,000 bail.

Adult bookstore robbed once again

3/15/94

By Thomas Moore
News Staff Writer

An allegedly intoxicated robber was caught Sunday after stealing $12.95 in magazines and $7.50 in token coins from the Pure Pleasure Video and Bookstore on Boulder Highway at approximately 8:35 p.m.

According to a Henderson Police Department news release, Eugene Charles Lee, 32, of Henderson and a past customer, walked into the store and threatened to shoot the clerk if he did not give him some cash.

The clerk gave the man $12.95 in token coins and as the suspect walked out he grabbed a magazine. The police searched the surrounding area and found Lee drinking in a bar on Boulder Highway not far from the scene of the crime. He was arrested and taken to the Henderson Jail where he was booked on a charge of robbery.

Adult bookstore scene of slaying

5/3/94

By Thomas Moore
News Staff Writer

A Las Vegas man was shot in the chest early Friday morning outside the Pure Pleasure adult bookstore on Boulder Highway. He died later that morning during surgery at the University Medical Center.

According to a Henderson Police Department news release, Redentor Castillo Nicolas, 27, had been inside Pure Pleasure some time before 2 a.m. He left the store but then returned to the store to tell the clerk he had been shot and then collapsed onto the floor. The clerk called the police and paramedics. Nicolas was taken to UMC where he died at 5 a.m.

Police have videotape, taken from surveillance cameras in the store, that shows two possible suspects who were in the store shortly before the shooting.

The first suspect was described as a white male in his late 20s or early 30s standing about 5 feet, 9 inches tall, weighing from 160 to 180 pounds with sandy brown hair. He wore a dark colored baseball cap, a green camouflage jacket, blue jeans and light-colored tennis shoes.

The second suspect was in the same age range, but stood approximately 5 feet, 7 inches tall and weighed 150-160 pounds. He also had sandy brown hair and wore a dark-colored baseball cap and light-colored tennis shoes. However, this suspect was wearing a brown-colored camouflage jacket and bluish-grey short pants.

The two suspects drove away in a white vehicle. Anyone with information is asked to call Henderson Detective James White, 565-2031.

Arrests made in death

6/7/94

By Thomas Moore
News Staff Writer

Police have arrested two suspects in the April shooting death of a man outside the Pure Pleasure Adult bookstore.

Carl George Schulte, 25, of Henderson and Larry John Ledale Gomer, 22, of Chino, Calif., were arrested for the murder while already in the Henderson Jail for stealing a motor vehicle.

Redentor Castillo Nicolas was killed Friday, April 29, shortly after 2 a.m. after visiting the store. The police had surveillance tapes of some people who were in the store before the killing but were unable at the time to find the killer.

APPENDIX D

CITY ATTORNEY LETTER DATED NOVEMBER 17, 1994, REPORTING ON COSTS OF ABSTENTION LITIGATION TO DATE.

[Reference: Respondents' Brief in Opposition at 51.]

CITY OF HENDERSON
CITY HALL 240 WATER STREET 702/565-2323
HENDERSON, NEVADA 89015
Gateway to Lake Mead Resorts

November 17, 1994

James J. Clancy, Esq.
9055 LaTuna Canyon Road
Sun Valley, CA 91352

Re: Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

Dear Jim:

You have requested a compilation of costs incurred by the City to date in litigating the case of Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

I have compiled the attorney's fees and costs for outside counsel and estimated our in-house counsel time.

Outside counsel fees and costs are as follows:

1990-91	$41,530.02
1992	21,794.68
1993	24,161.20
1994	32,728.08
TOTAL	$120,213.98

The time estimates for in-house counsel in litigating the initial stages of the case and in later review and discussion of the ongoing litigation are set forth below. Since we do not keep track of hours on a per case basis, these estimates are true estimates derived by reviewing the files, documents and transcripts to arrive at an approximation of the time involved.

Based upon a reasonable billing amount in the legal community of $100 per hour, I arrived at the following values:

1990	80 Hrs.	$8,000.00
1991	45 Hrs.	4,500.00
1992	25 Hrs.	2,500.00
1993	25 Hrs.	2,500.00
1994	15 Hrs.	1,500.00
TOTAL		$11,000.00

Additionally, you requested copies of newspaper clippings concerning criminal activity at the subject premises which included two homicides. Attached to this letter are xerox copies of newspaper clippings from the Henderson Home News.

If you need any additional information, please do not hesitate to contact me.

Very truly yours,

Liza Conroy
Assistant City Attorney

LC/avm

Enclosures

BEST AVAILABLE COPY

APPENDIX B-1

PAGES 51-61 OF PETITION FOR A WRIT OF CERTIORARI IN CITY OF HENDERSON ET AL. v. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., NO. 90-1771.

[Reference: Petitioners' supplemental Brief in No. 94-662 at pages 2, 3 and 4.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine."

Text at pages 3-4 reads:

" During the past 4 years, the City has articulated its reasoning to this Court not only in general terms, but also with reference to the specific example the City had in mind, in its first petition for writ of certiorari in No. 90-1771 at pages 51-61, (see Appendix B-1 at pages 53-54 to this brief) in relation to the opinion in 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 (CA 4 1989) - a lawsuit that was filed 8-1/2 years ago (May 1986)."

have rejected it. A sampling of these cases appears below in footnote 6."

There is national concern over the negative effects of "Adult Businesses." Communities across the United States have confronted the problem of how to contain and restrict the "secondary effects" associated with the presence of so-called sexually-oriented or "adult businesses" (for example, effects such as urban blight, property depreciation, and crimes). In a series of cases, this Court has upheld the right to use zoning ordinances to restrict the location of "adult businesses" [Young v. American Mini Theatres, 427 U.S. 50 (1976), Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986), and FW/PBS, Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, 110 S.Ct.___ (1990)]. This court should not allow the Home Rule Powers of the City of Henderson, a charter city, be

violated and the enforcement of "home rule" public rights by municipalities under zoning laws to become obfuscated by spurious "constitutional" claims as are made by Real Parties in Interest. This Court has held that zoning ordinances seeking to restrict location of "adult uses" are valid, and do not constitute impermissible prior restraints on free speech, and that such laws are adequately supported by municipal interest in planning and regulating the use of property for commercial purposes. Young v. American Mini Theatres, supra. A city's interest in the character of its neighborhoods and the preservation of the quality of urban life and its Home Rule Authority must be accorded high respect. Renton v. Playtime Theatre, Inc., supra.

This action imposes no restraint at all on Fantasy Video Plus' dissemination of particular materials, since it is

free to carry on its business in a lawful fashion at another location. The fact that such locations may be difficult to find is immaterial. Arcara v. Cloud Books, Inc., 478 U.S. 697, 92 L.Ed.2d 568 at 577, fn. 2, 106 S.Ct. 3172 (1986).

There is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [CA4 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S.Court of Appeals for further consideration in light of F.W./P.B.S., 493 U.S. ___, 107 L.Ed.2d 603 (1990)].

In the instant case, Fantasy Video Plus did not apply for a conditional use permit and thus failed to exhaust its

administrative remedies, as required. See Shelter Creek Development Corporation v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988) [challenge to constitutionality of city zoning ordinance held not ripe for judicial adjudication as parties never applied for variance or special use permit]; see, also, Ill. Commerce Cmm'n v. Thompson, 318 U.S. 675 and First Nat'l Bank v. Bd. of Cnty Cmmn'rs, 264 U.S. 450 (1924)]. Consequently, the constitutionality of the conditional use in the CH zone is not yet in issue.

III

THE CITY OF HENDERSON HAS BEEN, AND IS PRESENTLY, SUFFERING "IRREPARABLE HARM."

The operation of a business without a license is a public nuisance which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083. The

federal injunction is preventing the City from performing its civil function under its Home Rule Powers.

This federal action is barred by Younger-Huffman principles, which are grounded in the 11th Amendment, and are based upon a Constitutionally mandated deference to state courts in recognition of state sovereignty. Younger-Huffman requires that federal courts refrain from interefering with state court review of administrative application of state law, where the state has enforced its laws or has begun to enforce them. See, also, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) [the Court applied the articulation found in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 456 U.S. 423 (1982) of the Younger to ongoing state administrative proceedings, judicial or otherwise, in which important state interests are

vindicated and in which the federal plaintiff would have a full and fair opportunity to litigate consitutional claims]; and Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987) [Texaco (the state defendant) filed an action in federal court which sought to enjoin Pennzoil (the state plaintiff) from taking any action to enforce a multibillion dollar judgment that a Texas state court had rendered against Texaco and in favor of Pennzoil. Texaco did not avail itself of available state remedies, but filed an injunctive action in federal court. The Court found that the existance of an available state forum in which to Texaco could have raised its claims (which forum the Court held would be considered adequate until proved otherwise) barred Texaco's federal action.]

State proceedings (not tainted by bias, bad faith or harassment) for which

the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is initiated, until it has completed the review process. The City of Henderson began the adjudicative process of enforcing its laws when it initiated the quasi-judicial administrative proceeding before the City Council, which resulted in a determination by the City Council that Fantasy Video Plus' business license should be revoked because of fraudulent misrepresentations made in their business license application. The City Council stayed the enforcement of that revocation, in order to allow Fantasy Video Plus to pursue its right to state judicial review of the City of Henderson's revocation of said business license. The availability of state judicial review created an adjudicative continuum which existed at the time

Fantasy Video Plus filed its federal complaint. Alleghany Corp. v. Haase, 708 F.Supp. 1507 (W.D.Wis. 1989) at 1515-1519. The same Younger concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings, where state court review is available. Alleghany Corp. v. Haase, supra, at 1515. See also Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) at 639-640, citing World Famous Drinking Emporium, 820 F.2d 1079 (9th Cir. 1987) [Court found federal plaintiff clearly had unexhausted state appellate remedies where it had opportunity to appeal decision of Board of Building Appeals through state judicial system, holding "there was therefore an on-going state proceeding in this case" at the time the federal complaint was filed and that the Younger doctrine was applicable].

In this case, Fantasy Video Plus

lost its business license because of intentional fraudulent misrepresentations made in its application form. It is contrary to established public policy to preclude state enforcement action of Home Rule Powers against applicants who deliberately make false statements to the government in a business application in order to obtain a license. A federal litigant who has exhibited such "bad faith" is not entitled to a federal forum.

The preliminary injunction is a clear example of an unauthorized collateral federal appeal which substantially disrupts and interferes with the state appellate procedures which are en train. 4/

4/ The same jurisdictional issue was before the United States Supreme Court in Huffman, supra. There the Lucas County Common Pleas Court had entered a (Footnote Continued)

Additionally, because the declaratory judgment action was filed in state court before proceedings of substance on the merits took place in the federal court, the federal complaint should have been dismissed on the State's motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of Younger v. Harris, 401 U.S. 31 (1971), and related cases. Hicks v. Miranda, 422 U.S. 332, 349-350 (1975).

(Footnote Continued)
final injunction of "closure" on a hard-core pornographic theater, after holding that the autoptical evidence (film and time and motion studies) established that a public nuisance existed at that theater under the Ohio Red Light Abatement Statute. The entry of that final injunction started the running of the statutory time for filing an appeal to the Court of Appeal and Ohio Supreme Court. Because the federal trial court wrongfully assumed jurisdiction and granted injunctive relief the important adjudication of "closure" was prevented from being adjudicated in the Ohio Judicial System.

IV
CONCLUSION

Wherefore, Petitioners request this Court to:

(1) Grant a writ of certiorari pursuant to Rule 13 and require the United States District Court to vacate and annul its March 22, 1991 Order and to grant Petitioners' Motion to Dismiss the federal complaint on the ground of lack of federal jurisdiction.

(2) Pending action on this Petition, issue an Order requiring the United States District Court to stay the trial and the proceedings in the Court below which are presently set for Monday June 3, 1991.

Dated: May 16, 1991

James J. Clare

Attorney for Petitioners

APPENDIX B-2

PAGES 7-12 OF PETITION FOR A WRIT OF CERTIORARI IN CITY OF HENDERSON ET AL. v. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., NO. 92-643.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 2-3.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine."

The federal civil rights action was initiated by the Real Parties in Interest as a defense to the ongoing state license revocation enforcement proceedings. The case is now again before this Court for review, this time on petitions for a writ of certiorari and a peremptory writ of mandamus, on both the jurisdictional issue and concomitant res judicata and collateral estoppel questions.

(A) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Seventeen years ago, as counsel of record for the Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), counsel of record for Petitioners herein contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over

the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to an extension of the Younger abstention doctrine to civil cases[2]. [See Younger v. Harris, 401 U.S. 37 (1971).]

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, the opinion decided the case solely on the basis

---

[2] Huffman arose as an attack against a state court's final judgment determining the existence and abatement of a public nuisance and involved the use of real property. This type of suit was regarded at common law as being "in rem." In such an action, jurisdiction over the subject matter (i.e. the real property or the "res") could only be before one court at a time, and that rule was applied in cases involving the federal-state relationship.

On appeal, Appellant's primary argument had been that the trial court lacked jurisdiction to proceed with the federal civil rights action, filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the

(Footnote Continued)

of the Younger issue, without ruling explicitly that Younger was jurisdictional. His opinion remanded the case to the federal trial court for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional. While Justice Rehnquist's majority opinion did not address Appellant Huffman's primary "jurisdiction" contention, it did, however, underscore the fact that the Huffman Court was not suggesting "that the normal rules of res judicata and judicial estoppel do not

---

(Footnote Continued)
previous day, November 30, 1972, and the state action and "res" were still "pending" in the state court during the time allowed for post-trial motions and until the appeal period had expired.

operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18.

Questions 1 and 2 of the Petitions herein raise the same two issues of "jurisdiction" and "estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record and Petitions herein place before this Court for summary resolution the identical "jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist, but not then before the Huffman Court for decision. Petitioner contends that in the intervening seventeen years, the "jurisdictional" basis of Huffman has been clearly established (see Point I at pp. 29-

38, herein), and the "res judicata/collateral estoppel" issue has been firmly resolved in University of Tennessee v. Elliott, supra (see Point II at pp. 38-46, herein). A peremptory writ of mandate ordering a dismissal of the federal civil rights action below under the All Writs Act should therefore issue on the simple authority of the Huffman and University of Tennessee cases, in order to prevent the City of Henderson from suffering the same kind of "irreparable harm" which flows from a "collateral" attack through the mechanism of a federal case which is improperly permitted to continue on the merits (see Point III at pp. 47-57, infra), and to prevent the U.S. District Court from issuing an opinion which is in conflict with the related final state decision (regarding the parties' rights arising out of the City's license revocation action), and advisory in nature in violation of Article III of the U.S. Constitution which bans issuance of advisory opinions by lower federal courts.

Further, to the extent that the Real

Parties in Interest's civil rights action attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989 (see Statement of Facts at page 12), such is barred by Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a city or state to have newly enacted legislation, containing a severability clause, construed initially by the state court system. [See Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a

APPENDIX B-3

PAGES 11-16 OF PETITION FOR WRIT OF MANDAMUS AND PAGES 9-20 OF SUPPLEMENTAL BRIEF IN NO. 93-1969. [Reference: Petitioners' Supplemental brief in No. 94-662 at pp. 2-3 and 11-12.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's 11th Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See...Petition for Writ of Mandamus in No. 93-1969 at pp. 11- 16, and Supplemental Brief at pp. 9-20...."

Text at pages 11-12 reads:

" Further, as Henderson's Respondents' Brief in Opposition (filed on Dec. 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the Eleventh Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See Supplemental Brief to Petition for Writ of Mandamus in Case 93-1969, at pp. 19-20...."

An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 90-1771 was made to Justice O'Connor on May 9, 1991 and denied on May 16, 1991. A second application in No. 90-1771 was made to Justice Kennedy who referred the matter to the Court which denied the application on June 10, 1991. An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 92-693 was made to Justice O'Connor and denied by her on October 27, 1992.

On November 27, 1992, while the petition for writ of certiorari in No. 92-649 was still pending in this Court, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL). See Appendix A.

On November 27, 1992, the United States District Court entered an Order and Final Judgment in which the Federal

Court erroneously relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.
>
> "Rather, plaintiffs inquired whether a business license would be

> approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants

filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. Reference: footnote 1 on page 10, supra. See Supplemental Brief at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion

in which it denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response[2/] to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a

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2/ A copy of the City's Response is being filed with the Clerk of this Court for purposes of reference in connection with this Petition for Writ of Mandamus.

In this Petition for Writ of Mandamus, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a usurpation of the judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger Abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

I

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION.

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v.

Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of mandamus, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in

Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

The City of Henderson claims that the analysis in Wiener v. Counties of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet

been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away

with the confusion which is presently generated in the race to the Courtroom.

II

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the neglect of the County Counsel to focus upon the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387 (1941). As a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same

> legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective). Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al.

v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court,

including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix 7 page 7-7 herein and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in

substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications, involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to

set up a Constitutional "collision course."

III

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

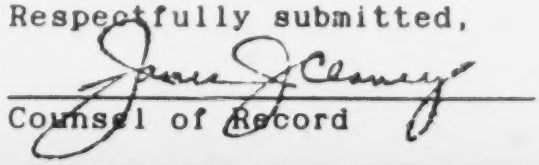
The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to this Petition for Writ of Mandamus is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

CONCLUSION

Dubinka clearly establishes that the Ninth Circuit's analysis and orders in In Re City of Henderson v. Nevada Entertainment Industries Inc., (supra) on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Mandamus should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Mandamus.

Dated: September 16, 1994

Respectfully submitted,



Counsel of Record

APPENDIX B-4

PAGES 51-64 OF PETITION FOR WRIT OF CERTIORARI IN NO. 94-662.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 3 and 12.]

Text at pages 2-3 reads:

"Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's 11th Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See Henderson...Petition for Writ of Certiorari in No. 94-662 at pp. 51-64."

Text at pages 11-12 reads:

" Further, as Henderson's Respondents' Brief in Opposition (filed on December 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the 11th Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9, April 8, 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See...Point I(C) of the Henderson's Petition in 94-662 at pages 61-64."

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Dubinka analysis, and that the incorrect view is that which is espoused by the Wiener and Henderson decisions.

I(A)

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THE VALIDITY OF THE CITY OF HENDERSON'S CLAIM THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION AND THAT THE COURT OF APPEALS BELOW ERRED IN REFUSING TO DISMISS THE CIVIL RIGHTS LAWSUIT UPON THE "LACK OF SUBJECT MATTER JURISDICTION ISSUE".

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City

claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of certiorari, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In

Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

Judge Browning and the Ninth Circuit Panel erred similarly in the City of Henderson appeal herein in refusing to rule upon the "lack of subject matter jurisdiction" issue, which refusal invited the Nevada Entertainment Industries Inc.'s to file its petition for rehearing and suggestion that the Court rehear the matter enbanc on November 30, 1993. See in this regard, the City's response to that petition for rehearing at Appendix Pages 4-10 thru 4-17, where the City contends that the Court of Appeals continuing failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issues is responsible for the confusion which is flowing from the Ninth Circuit's Huffman decisions, and the

conflict within the Ninth Circuit as examplied by the recent clash between the Wiener, supra, and Dubinka, supra, analysis.

The City of Henderson claims that the analysis in Wiener v. County of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state

court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away with the confusion which is presently generated in the race to the Courtroom.

I(B)

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the failure of the County Counsel to focus upon the importance of the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387

(1941). The City contends that, as a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute San Diego County ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective).

Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County of San Diego was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because, as in this City of Henderson situation, the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

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support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court, including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix __ page 7-7 et seq. of the Supplemental Brief in Case No. 93-1969 and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights

plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

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involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to set up a Constitutional "collision course."

I(C)

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The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to the Petition for Writ of Certiorari herein is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman

challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

Dubinka clearly establishes that the Ninth Circuit's analysis and orders on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level, and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Certiorari should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Certiorari under

Rules 10.1(a) and 10.1(c) of the United States Supreme Court.

CONCLUSION

For all of the above reasons, the Judgment of the Court of Appeals and Memorandum Decision filed May 4, 1994 should be reversed and the case remanded with instructions (1) to reinstate the Opinion and Judgment which was entered on November 2, 1993; (2) on the grounds that the Court lacked subject matter jurisdiction in accordance with the analysis in Dubinka v. Judges of the Superior Court, 23 F3d 218 (April 8, 1994); and (3) finding that the City of Henderson is entitled to move in the U.S. District Court for a reasonable attorney fee under 42 U.S.C. section 1988 as the prevailing party on the issues of Huffman Abstention and lack of subject matter jurisdiction.

Further the May 4, 1994 Order of Dismissal of the Preliminary Injunction against the City upon an independent

Finding of Fact and lack of subject matter jurisdiction under the clean hands equity maxim; (1) coming as it does more than 4 years after Assistant City Attorney Conroy had unsuccessfully urged those grounds for Dismissal at the first hearing on the TRO in the District Court on April 27, 1990, and (2) which adverse ruling required the City Attorney's Office to seek other means (Huffman Abstention) to defeat the federal court's willingness to assume jurisdiction of the state matter, (alleged to present a civil rights claim) and (3) which now would operate in a manner which would unjustly defeat the City Attorney's right to move for a reasonable attorney fee under 42 U.S.C. Section 1988 as a prevailing Defendant in a Civil Rights Lawsuit on this Huffman Abstention issue, is inequitable.

Dated: Oct. 11, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record

APPENDIX C

LIST OF 38 JUDGES NOW SITTING ON U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Reference: Petitioners' Supplemental Brief in 94-662 at page 15.]

Text at page 15 reads:

"The present problem in the Ninth Circuit is a magnification of that ground. Counsel of Record submits that of the 38 judges on the Ninth Circuit (see attached list at Appendix C), only those participating in Dubinka have demonstrated a clear understanding as to the "jurisdictional" (subject matter jurisdiction) meaning of Younger-Huffman abstention, and its interaction with the Eleventh Amendment. Argument in relation to the Eleventh Amendment, as in this case, is shunned as thought it were a plague, rather than a revered constitutional right belonging to each Sovereign State."

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Ninth Circuit

(Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Alaska, Hawaii, Guam, Northern Mariana Islands)

Judges:

J. Clifford Wallace, Chief Judge
4192 U.S. Courthouse
940 Front Street
San Diego, California 92101-8918
(619) 557-6114

James R. Browning
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(415) 744-9600

Proctor Hug, Jr.
50 West Liberty Street, Suite 800
Reno, Nevada 89501-1948
(702) 784-5631

Mary M. Schroeder
6421 U.S. Courthouse
230 North First Avenue
Phoenix, Arizona 85025
(602) 514-7002

Betty Binns Fletcher
1000 U.S. Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1180
(206) 553-2670

Jerome Farris
1030 U.S. Courthouse
1010 Fifth Avenue
Seattle, Washington 98104
(206) 553-2672

Harry Pregerson
21800 Oxnard Street, Suite 1140
Woodland Hills, California 91367-3633
(818) 710-7791

Cecil F. Poole
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San Francisco, California 94119-3939
(415) 744-9946

Dorothy W. Nelson
303 U.S. Court of Appeals Bldg.
125 South Grand Avenue
Pasadena, California 91105-1510

William C. Canby
6445 U.S. Courthouse
230 North First Avenue
Phoenix, Arizona 85025
(602) 514-7031

William A. Norris
1712 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-6888

Stephen Reinhardt
1747 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-3639

Robert R. Beezer
802 U.S. Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1180
(206) 553-0384

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(702) 784-5436

Melvin T. Brunetti
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(619) 557-6400

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Portland, Oregon 97204-1396
(503) 326-2187

Edward Leavy
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555 S.W. Yamhill Street
Portland, Oregon 97204-1396
(503) 326-5665

Stephen S. Trott
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550 W. Fort Street
Boise, Idaho 83724-0040
(208) 334-1612

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(818) 583-7121

Pamela Ann Rymer
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Boise, Idaho 83702
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Andrew J. Kleinfeld
250 Cushman Street, Suite 3A
Fairbanks, Alaska 99701-4665
(907) 456-0565

Senior Judges:

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204 James A. Walsh Courthouse
55 East Broadway
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(602) 670-6438

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